Argued & submitted Nov 26

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~1053~~ 673 ~~966~~ 97

ERASTUS F. BROWN AND FRANCIS A. KENYON, EXECUTORS OF THE LAST WILL OF JOHN S. KENYON, DECEASED, AND TRUSTEES OF HIS ESTATE UNDER THE WILL, APPELLANTS,

vs.

SARAH S. SUTTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 10, 1885.

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1 Circuit Court of the United States of America for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, } ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee, in said district, on the first Monday (being the fifth day) of January, A. D. 1885—present and presiding, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, assigned to said circuit, and the Honorable Charles E. Dyer, district judge; Henry Fink, marshal; Edward Kurtz, clerk—among other, the following proceedings were had, to wit:

SARAH S. SUTTON, Complainant,
vs.
ERASTUS F. BROWN & FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, & Francis A. Kenyon, Defendants. } In Equity.

2 Be it remembered that heretofore, to wit, at a stated term of said court begun and held according to law at the city of Milwaukee, on the first Monday (being the first day) of January, A. D. 1883, and on the first day thereof, to wit, on the first day of January, A. D. 1883, the following proceedings were had, to wit:

Order Docketing Case on Removal from State Court.

This day came the defendants, Erastus F. Brown & Francis A. Kenyon, as executors of the will of John S. Kenyon, deceased, and trustees of his estate under the will, by their counsel, Messrs. Jenkins, Elliott & Winkler, and presented to the court copies of the process, pleadings, and proceedings in this cause, certified from the circuit court for Waukesha county, in this district, pursuant to an order of said court removing the cause to this court, including copies of the petition of said defendants for such removal, their bond required by law therefor, and of said order of removal.

Whereupon it is ordered by the court that the said copies be filed, and that the cause be entered on the chancery docket of this court, and be proceeded with in the same manner as if it had been commenced here by original process, which papers are as follows:

Summons.

STATE OF WISCONSIN:

Circuit Court, Waukesha County.

3 SARAH S. SUTTON, Plaintiff,

vs.

ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon, Defendants.

The State of Wisconsin to the said defendants and each of them:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and, in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

HURLBUT & VAN ALSTINE,
Plaintiff's Attorneys.

P. O. address: Oconomowoc, Waukesha county, Wis.

Filed June 29, 1882.

T. C. MARTIN, *Clerk.*

Complaint.

Circuit Court, Waukesha County.

SARAH S. SUTTON, Plaintiff,
against
ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate,
4 under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon, Defendants.

The complaint of the plaintiff, by Hurlbut & Van Alstine, her attorneys, respectfully states:

That in or about the month of June, 1872, at Oconomowoc, Waukesha county, State of Wisconsin, John S. Kenyon, named above as deceased, entered into a parol agreement with the plaintiff (her husband, C. T. Sutton, consenting thereto and approving of the same), wherein and whereby said John S. Kenyon was to become a member of the family of her husband and herself, and have her care and society in sickness and in health, and to have all the comforts of a home as long as he so desired, in consideration of which he agreed and promised that the plaintiff should be by him well provided for; that he remained with the plaintiff and her said husband, under said agreement, until on or about the last of August, 1880, when he entered into another parol agreement with the plain-

tiff at the city of Oconomowoc, Wisconsin (her said husband consenting thereto and approving of the same), wherein and whereby he was to continue and remain a member of the family of her said husband and herself, and was to have the care and society of the plaintiff in sickness and in health, and have all the comforts of a home so long as he should live, and the
5 plaintiff was to go with said John S. Kenyon to New York winters and keep house for him there as long as he should desire to remain there; in consideration of which agreement, and the services and privileges theretofore rendered and accorded to him as aforesaid, said John S. Kenyon agreed and promised to purchase a certain piece of real estate in said city of Oconomowoc, Waukesha county, Wisconsin, then in market, and build a new house upon the same of sufficient dimensions to accommodate several persons besides the plaintiff, her husband, and said John S. Kenyon, and to make other suitable improvements thereon, and on the completion of said house and other improvements convey and transfer the title to the plaintiff in fee, which piece of real estate is described as follows, to wit:

Commencing in the centre of the highway heretofore known as the Milwaukee and Watertown plank road, at a point where the north and south quarter line of section thirty-two (32), town eight (8) north, range seventeen (17) east, crosses said highway, and witnessed by "sugar maple" 3 in. S. 9½ E. 44 links, and by another "sugar maple" 3 in. S. 83° W. 95 links, and by "cherry" 9 in. N. 76¼° E. 228½ links; thence from said point thus witnessed
6 north at variation 5° 55′ east, so as to strike about ten links west of a "hickory" about six inches; thence on same course twenty-one chains and ten links (21.10) to the bank of La Belle Lake, about eight links west of an elm stump 30 in. in diameter, said line supposed to be the north and south quarter line of said section thirty-two (32); thence west in measurement five (5) chains (but the land hereby conveyed to be bounded by La Belle Lake); thence about S. 80° W. along the bank of La Belle Lake to black oak marked by an axe only; thence S. about 3½° east about ten chains to centre of said highway, (which centre is witnessed by a "hickory" 5 in. N. 76½° E. 101 links, and by "sugar maple" 3 in. S. 11¼° E. 57 links); thence south 61½° east in centre of said highway six chains and twelve links to place of beginning, containing eleven and 1.7 acres of land, more or less, excepting and reserving therefrom the following piece or parcel of land conveyed by Samuel Breck and wife to Jacob Johnson by deed dated November 1st, 1869, and recorded in register of deeds' office for Waukesha county, Wisconsin, in vol. 49 of deeds, on page 420, and described as follows:

"A parcel of land in the east half of west half of section No. 32, town 8 north, range 17 east, in said Waukesha county, Wisconsin, commencing in the centre of the highway heretofore known
7 as the plank road and two rods west of the north and south quarter line of said section; thence north parallel with said quarter line four and $\frac{38}{100}$ chains measured perpendicularly from and to the centre line of said highway; thence north 60¾° west par-

allel to said highway $6\frac{37}{100}$ chains to the west line of the first above described lands; thence S. $3\frac{1}{2}°$ E. to the centre of said highway; thence S. $60\frac{3}{4}°$ E. $5\frac{91}{100}$ chains to the place of beginning, being three acres, more or less.

That thereafter, and on or about the 23d day of September, 1880, the said John S. Kenyon did purchase the premises above described and put the plaintiff in possession thereof in pursuance of said agreement, which possession the plaintiff has ever since held and now holds; and shortly after said purchase said John S. Kenyon, in pursuance of said agreement, commenced to make improvements thereon, laying out and beautifying the grounds, building a small barn and boat-house thereon, and moving and repairing an old house thereon.

And on or about the 1st of September, 1881, said John S. Kenyon commenced the erection and construction of a house thereon in pursuance of said agreement, the estimated cost of which was a little over seven thousand dollars, putting the entire management and supervision of the erection and construction of said house in the hands of C. T. Sutton, the husband of this plaintiff, the said
8 C. T. Sutton to make all contracts for work and materials, and to arrange and construct said house as the plaintiff should direct, and said John S. Kenyon furnishing money from time to time as the same was needed in the erection and construction thereof.

That said John S. Kenyon died at the city of New York, in the State of New York, on or about the 23rd day of January, 1882, and that said house was still in process of erection and construction at the time of his death, only about three thousand dollars having been furnished and expended thereon.

That said John S. Kenyon was at the time of his death carrying out and performing his part of said agreement in good faith.

That the plaintiff duly performed all the conditions of said agreement on her part.

That on the 28th day of February, A. D. 1879, said John S. Kenyon executed an instrument in writing, bearing date on that day, which instrument was thereafter, to wit, on the 10th day of February, A. D. 1882, adjudged and decreed by the surrogate court of the county of New York, in the State of New York, to be the last will and testament of said John S. Kenyon, deceased, and to be a will of real and personal estate, and was by said surrogate court on said day duly admitted to probate as such.

That said John S. Kenyon, by his said will, nominated,
9 constituted, and appointed the above-named defendants, Erastus F. Brown and Francis A. Kenyon, to be the executors of his said will and also trustees for the trusts therein contained.

That said John S. Kenyon by his said will, after directing that all his just debts be paid by his executors, and after making several small bequests of chattels, gave, devised, and bequeathed to his said executors all the rest, residue, and remainder of his estate, both real and personal, in trust; to sell and dispose of all his real estate within ten years after his decease, either at public or private sale, and on such terms and in such manner as his said executors should

deem and determine to be for the best interest of his estate, and then by his said will be made divers dispositions of the proceeds.

The plaintiff states further, upon information and belief, that said John S. Kenyon died leaving an estate of the value of one hundred and fifty thousand dollars over and above all his debts and liabilities.

That on the said 10th day of February, 1882, the above-named defendant, Erastus F. Brown, duly qualified and accepted the office of executor of said will, and on said day the said surrogate court, of the county of New York, in the State of New York, duly issued letters testamentary to him as such executor. And the plaintiff states, upon information and belief, that he thereupon entered upon his duties as such executor, and also accepted and entered upon his duties as trustee under said will, and has ever since continued so to act in both capacities.

10 That on the 20th day of March, 1882, the above-named defendant, Francis A. Kenyon, duly qualified and accepted the office of executor of said will, and on said day the said surrogate court of the county of New York, in the State of New York, duly issued letters testamentary to him as such executor, in conjunction with the defendant, Erastus F. Brown. And the plaintiff states, upon information and belief, that he thereupon entered upon his duties as such executor, and also accepted, entered upon his duties as trustee under said will, and has ever since continued so to act in both capacities.

That on the 19th day of May, 1882, the plaintiff caused to be personally served upon said defendants, Erastus F. Brown and Francis A. Kenyon, and each of them, a notice in writing, having incorporated therein the said agreement between the plaintiff and their testator, and a demand that the defendants, Erastus F. Brown and Francis A. Kenyon, as the executors of the will of said John S. Kenyon, deceased, and trustees of his estate under the will, carry out and perform what remained to be performed of said agreement on the part of their testator, to wit, that they complete said house in process of erection and construction, and on completion thereof convey said premises to the plaintiff in fee.

That thereafter, and on or about the second day of June, 1882, said defendants, Erastus F. Brown and Francis A. Kenyon, at the

11 city of New York, county of New York, and State of New York, where they reside, refused, as the executors of the will of said John S. Kenyon, deceased, and trustees of his estate under the will, or in either capacity, to carry out and perform said agreement on the part of their testator and every part thereof, and have ever since neglected and refused to carry out and perform the same and every part thereof.

That the defendants, James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon, are the heirs-at-law and the only heirs-at-law of the said John S. Kenyon, deceased.

Wherefore the plaintiff demands judgment, first, against all the defendants, that the court transfer and pass the title to said real estate to the plaintiff; second, against the defendants, Erastus F.

Brown and Francis A. Kenyon, as executors of the will of John S. Kenyon, deceased, that they complete said house in process of erection and construction on said real estate in such time as the court shall deem reasonable, and on default thereof, if default thereof shall be by them made, that the plaintiff have judgment against them for the sum of four thousand dollars or for such sum as will be sufficient to complete the said house according to the plans and specifications thereof if a less sum will be sufficient, and for such other and
12 such further relief as the court shall deem just and equitable in the premises.

Third. Against the defendants, Erastus F. Brown and Francis A. Kenyon, as executors of the will of John S. Kenyon, deceased, for costs of this action.

HURLBUT & VAN ALSTINE,
Plaintiff's Attorneys.

STATE OF WISCONSIN, } ss:
Waukesha County, }

Sarah S. Sutton, being duly sworn, says: She is the plaintiff in the above-entitled action; that she has heard the foregoing complaint read and knows the contents thereof, and that the same is true to her knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

SARAH S. SUTTON.

Subscribed and sworn to before me this 28th day of June, 1882.

C. H. VAN ALSTINE,
Court Commissioner in and for Waukesha County, in the State of Wisconsin.

[Endorsed:] Circuit court, Waukesha county. Filed June 29' 1882. T. C. Martin, clerk.

STATE OF WISCONSIN, } ss:
Waukesha County, }

Circuit Court, Waukesha County.

SARAH S. SUTTON, Plaintiff,
against
ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon,
13 Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon, Defendants.

Sarah S. Sutton, being duly sworn, says: That she is the plaintiff in the above-entitled action; that summons, with the complaint annexed, to be served therewith, has been issued in said action, and that the plaintiff is unable with due diligence to make service thereof upon any of the defendants above named; that all of said defendants are non-residents of the State of Wisconsin, and cannot, after due diligence, be found therein; that the defendant, Erastus F. Brown, is a resident of the city, county, and State of New York, and

that his post-office address is No. 307 East 124th street, New York city, State of New York; that the defendant, Francis A. Kenyon, is a resident of the city, county, and State of New York, and that his post-office address is No. 47 Walker street, New York city, State of New York; that the defendant, James Kenyon, is a resident of Dundee, in the State of Michigan, which is his post-office address; that the defendant, Maria S. Kenyon, is a resident of the city, county, and State of New York, and that her post-office address is No. 307 East 124th street, New York city, State of New York; that the defendant, Elizabeth B. Kenyon, is a resident of the city, county, and State of New York, and that her post-office address is No. 307
14 East 124th street, New York city, State of New York; that the defendant, Abigail B. Clark, is a resident of Colchester, in the State of Connecticut, which is her post-office address; that the defendant, Caroline B. Brown, is a resident of the city, county, and State of New York, and that her post-office address is No. 307 East 124th street, New York city, State of New York; that the defendant, Francis A. Kenyon, is a resident of the city, county, and State of New York, and that his post-office address is No. 47 Walker street, New York city, State of New York.

SARAH S. SUTTON.

Subscribed and sworn to before me, this 28th day of June, 1882.

C. H. VAN ALSTINE,
Court Commissioner in and for Waukesha County, in the State of Wisconsin.

[Endorsed:] Circuit court, Waukesha county. Filed June 29, 1882. T. C. Martin, clerk.

Summons.

STATE OF WISCONSIN:

Circuit Court, Waukesha County

SARAH S. SUTTON, Plaintiff,

[*vs.*]

ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon, Defendants.

The State of Wisconsin to the said defendants, and each of them:

15 You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, a copy of which is herewith served upon you.

HURLBUT & VAN ALSTINE,
Plaintiff's Attorney.

P. O. address, Oconomowoc, Waukesha county, Wis.

Order of Publication.

Circuit Court of Waukesha County.

SARAH S. SUTTON, Plaintiff,
against
ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon, Defendants.

At a regular term of said court, begun and held at the court-house in the village of Waukesha on the 23rd day of May, 1882, Hon. A. Scott Sloan, judge, presiding.

On reading and filing the duly verified complaint herein showing that a cause of action exists in favor of the plaintiff and against the defendants founded upon contract; that said cause of action arose in this State and that the court has jurisdiction thereof;
16 that the subject of the action is real property in the county of Waukesha and State of Wisconsin, and that the defendants have an interest therein, and that the demand consists partially in excluding the defendants from any interest therein.

And on reading and filing the affidavit of Sarah S. Sutton, the plaintiff, made the 28th day of June, 1882, and entitled herein showing that the summons, with the complaint annexed, to be served therewith, has been issued herein, and that the plaintiff is unable with due diligence to make service thereof upon any of the defendants; that all of said defendants are non-residents of the State of Wisconsin and cannot, after due diligence, be found therein.

That the defendant, Erastus F. Brown, is a resident of the city, county, and State of New York, and that his post-office address is No. 307 East 124th street, New York city, State of New York.

That the defendant, Francis A. Kenyon, is a resident of the city, county, and State of New York, and that his post-office address is No. 47 Walker street, New York city, State of New York.

That the defendant, James Kenyon, is a resident of Dundee, in the State of Michigan, and that his post-office address is Dundee, State of Michigan.

That the defendant, Maria S. Kenyon, is a resident of the city, county, and State of New York, and that her post-office address is No. 307 East 124th street, New York city, State of New York.
17 That the defendant, Elizabeth B. Kenyon, is a resident of the city, county, and State of New York, and that her post-office address is No. 307 East 124th street, New York city, State of New York.

That the defendant, Abigail B. Clark, is a resident of Colchester, in the State of Connecticut, and that her post-office address is Colchester, State of Connecticut.

That the defendant, Caroline B. Brown, is a resident of the city, county, and State of New York, and that her post-office address is No. 307 East 124th street, New York city, State of New York.

That the defendant, Francis A. Kenyon, is a resident of the city, county, and State of New York, and that his post-office address is No. 47 Walker street, New York city, State of New York:

Now, therefore, on motion of Hurlbut & Van Alstine, attorneys for the plaintiff, it is ordered hereby that the summons in this action, a copy of which is hereto attached, be served upon said defendants by its publication in the Wisconsin Free Press, a weekly newspaper published at the city of Oconomowoc, Waukesha county, Wisconsin, which is designated as most likely to give notice to said defendants, once in each week for six weeks, and that on or before the day of the first publication thereof the plaintiff deposit in the post office at Oconomowoc, Waukesha county, Wisconsin, a copy of the summons, together with a copy of the complaint securely
18 enclosed in an envelope, addressed to each of said defendants at their respective post-office addresses, to wit:

A copy of the summons and complaint addressed "Erastus F. Brown, No. 307 East 124th street, New York city, State of New York." A copy of the summons and complaint addressed "Francis A. Kenyon, No. 47 Walker street, New York city, State of New York." A copy of the summons and complaint addressed "James Kenyon, Dundee, State of Michigan." A copy of the summons and complaint addressed "Maria S. Kenyon, No. 307 East 124th street, New York city, State of New York." A copy of the summons and complaint addressed "Elizabeth B. Kenyon, No. 307 East 124th street, New York city, State of New York." A copy of the summons and complaint addressed "Abigail B. Clark, Colchester, State of Connecticut." A copy of the summons and complaint addressed "Caroline B. Brown, No. 307 East 124th street, New York city, State of New York." A copy of the summons and complaint addressed "Francis A. Kenyon, No. 47 Walker street, New York city, State of New York;" and duly pay the postage on each and every one of said copies before depositing the same in said post office, or, that, at the plaintiff's option, a copy of the summons and a copy of the complaint be delivered to each of said defendants, personally, without the State of Wisconsin.

And it is further ordered hereby if service be made by publication that the first publication be made within three months from the date hereof.

19 Dated June 29th, 1882.

By the court: A. SCOTT SLOAN, *Judge.*

(Endorsed:) Circuit court, Waukesha county. Filed June 29, 1882. T. C. Martin, clerk.

Circuit Court, Waukesha County.

SARAH S. SUTTON *vs.* ERASTUS F. BROWN *et al.*

We hereby admit due service upon us of notice of retainer by Jenkins, Elliott, and Winkler, for the defendants, Erastus F. Brown and Francis A. Kenyon, as executors, &c., in the above-entitled cause;

also due service upon us of "answer" of the defendants last aforesaid, this 15th day of August, A. D. 1882.

HURLBUT & VAN ALSTINE,
Plaintiff's Attorneys.

(Endorsed:) Circuit court, Waukesha county. Filed Dec. 5, 1882. T. C. Martin, clerk.

Notice of Retainer.

Circuit Court, Waukesha County.

SARAH S. SUTTON, Pl'ff,
against
ERASTUS F. BROWN and FRANCIS A. KENYON, &c., *et al.*, Def'ts.

SIRS: Please take notice that we are retained by and appear in the above-entitled action for Erastus F. Brown, Francis A. Kenyon, as executors of the will of John S. Kenyon, dec'd, & trustees of his estate, &c., two of the defendants therein, and demand that
20 copies of all papers hereafter to be served on said def'ts in said action be served on us at our office, Nos. 1, 3, 5, & 6, Ludington's Block, in the city of Milwaukee, State of Wisconsin.

Dated August 14th, 1882.

Yours, &c.,

JENKINS, ELLIOTT & WINKLER,
Attorneys for Defendants, Brown & Kenyon, as Ex., &c.

To Hurlbut & Van Alstine, Esq's, plaintiff's attorneys.

Endorsed: Circuit court, Waukesha county. Filed Dec. 5, 1882. T. C. Martin, clerk.

Answer.

Circuit Court, County of Waukesha.

SARAH S. SUTTON, Plaintiff,
against
ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon, Defendants.

And the said defendants, Erastus F. Brown and Francis A. Kenyon, as executors of the will of John S. Kenyon, deceased, and trustees of his estate under the will, impleaded, &c., by Jenkins, Elliott & Winkler, their attorneys, come and defend the said action, and, for answer to the complaint of the said plaintiff, admit, deny, and allege as follows:

21 First. These defendants admit the death of John S. Kenyon, as alleged, and the execution and probate of his will, as alleged, and that these defendants were thereupon appointed executors and trustees, as alleged, and that the real and personal estate of said Kenyon was, in and by said will, devised and bequeathed to

these defendants in trust and upon the trusts expressed in said will, and that said will was duly probated and letters testamentary thereon were duly issued to these defendants, as in said complaint alleged, by the surrogate court of the county of New York, State of New York, the said John S. Kenyon being, at the time of his death, a resident of the said county and State of New York, and that these defendants have entered upon and are in the active discharge of their duties as such executors, and that the said other defendants are the only heirs-at-law of said John S. Kenyon, and that said John S. Kenyon died possessed of the estate in excess of all his just debts and liabilties.

Second. The defendants admit and allege that in the months of September or October, 1880, the said John S. Kenyon purchased the premises substantially described in said complaint (except that the same are inaccurately described therein) of Jane Breck and others for the consideration of $2,300.00, and received a deed from Jane Breck and others, dated September 21st, 1880, and acknowl-
22 edged by the several grantors therein on or before the 28th day of September, 1880, and which was delivered and duly recorded on or before October 4, 1880; that said Kenyon entered into possession, under said deed, of the premises therein described, and remained in possession thereof until his death; that said Kenyon, in his lifetime, in some measure improved and beautified said premises, and in 1881 commenced the erection and construction of a dwelling-house thereon, in process of construction at the time of his death, but of what estimated cost, or how much had been expended thereon by said Kenyon at his death, these defendants have no knowledge or information sufficient to form a belief.

Third. These defendants admit the notice and demand of the plaintiff upon the defendants to carry out and perform the said alleged agreement, and that they, said defendants, neglected and refused so to do.

Fourth. That, except as hereinabove expressly admitted, these defendants deny, upon their information and belief, each and every allegation, matter, fact, and thing in said complaint stated and contained.

Fifth. That the said supposed agreement in said complaint alleged was not, nor was any note or memorandum thereof expressing the consideration in writing, or subscribed by the said John S. Kenyon, or by any lawfully authorized agent of said Kenyon, nor by
23 the plaintiff, nor was said supposed agreement ever partly performed.

JENKINS, ELLIOTT & WINKLER,
Attorneys for Defendants, Milwaukee, Wisconsin.

STATE OF NEW YORK, }
City and County of New York, } ss:

Erastus F. Brown and Francis A. Kenyon, the defendants above named, being severally duly sworn, say, and each for himself says: That he has read the foregoing answer, and knows the contents thereof, and that the same is true to his own knowledge, except as

to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ERASTUS F. BROWN.
FRANK A. KENYON.

Subscribed and sworn to before me this ninth day of August, 1882.

JNO. H. VARNOLD,
Commissioner of Deeds for Wisconsin in New York.

(Endorsed:) Circuit court, county of Waukesha. Filed Dec. 5, 1882. T. C. Martin, clerk.

Petition for Removal.

THE STATE OF WISCONSIN:

Circuit Court of Waukesha County.

SARAH S. SUTTON
vs.
ERASTUS F. BROWN & FRANCIS A. KENYON, as Executors of the Last Will of John S. Kenyon, Deceased, and Trustees of
24 his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon.

To the Hon. A. Scott Sloan, the judge of said court:

The petition of the defendants, Erastus F. Brown & Francis A. Kenyon, as executors of the last will of John S. Kenyon, dec'd, & trustees of his estate under the will above named, respectfully show that they are citizens of the State of New York, and that the plaintiff is a citizen of the State of Wisconsin; that the above-entitled action was commenced by the service of summons in said county on the 3rd day of July, A. D. 1832; that this action is brought for the specific performance of an alleged agreement made by John S. Kenyon, deceased, touching certain real estate in Waukesha county, Wisconsin; that by his said will the fee of the property was granted to your petitioners, and they are the sole owners thereof in trust, for the purposes expressed in the will; that the other defendants are also citizens of the State [of] New York, and have been served with process, if at all, by the publication of the summons; that said other defendants have not appeared in the action, and have no title or interest in the property in dispute; that they are legatees to a small amount under the will, but not the principal legatees; that the controversy is solely between the plaintiff and your petitioners, who are citizens of different
25 States; that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and that the December term (commencing on the 1st Tuesday of December, 1882) of said court is the first term of said court at which said cause could be tried, and that it has not yet been tried; and your petitioners herewith present their bond, with Harrison Ludington, a good and

sufficient surety, for their entering at the next term of the circuit court of the United States for the eastern district of Wisconsin on the first day of its next session a copy of the record in the above-entitled cause. Copies of said process against petitioners and of all pleadings, depositions, testimony, and other proceedings in the cause, and for the payment of all costs which may be awarded if said court shall hold that this cause was wrongfully or improperly removed thereto, and also for thus appearing and entering special bail in said suit if special bail was originally requisite therein; and your petitioners hereby offer to furnish such additional surety as this honorable court shall require.

Wherefore your petitioners pray this court to accept said petition and bond, and to proceed no further in this action, pursuant to the provisions of the acts of Congress in that behalf.

ERASTUS F BROWN &
FRANCIS A. KENYON,
26 *As Executors of the Will of John S. Kenyon, deceased, &*
Trustees of the Estate under the Will.
By JENKINS, ELLIOTT & WINKLER,
Their Attorneys.

(Endorsed:) Circuit court, Waukesha county. Filed Dec. 5, 1882. T. C. Martin, clerk.

Undertaking.

Know all men by these presents that we, Erastus F. Brown and Francis A. Kenyon, as executors of the last will of John S. Kenyon, deceased, and trustees of his estate under the will as principal, and Harrison Ludington, of Milwaukee county, Wisconsin, as surety, are held and firmly bound unto Sarah S. Sutton in the sum of five hundred dollars, to be paid to the said Sarah S. Sutton, her executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the 1st day of December, A. D. 1882.

Whereas the above-bounden Erastus F. Brown and Francis A. Kenyon, as executors of the last will of John S. Kenyon, deceased, & trustees of his estate under the will, have petitioned the circuit court of Waukesha county, State of Wisconsin, for the removal of a cause therein pending, wherein Sarah S. Sutton is
27 plaintiff, and Erastus F. Brown & Francis A. Kenyon, as executors of the will of John S. Kenyon, deceased, and trustees of his estate under the will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, & Francis A. Kenyon are defendants, to the circuit court of the United States for the eastern district of Wisconsin, pursuant to the provisions of the acts of Congress in that behalf:

Now, therefore, the condition of the above obligation is such that if the above-bounden Erastus F. Brown & Francis A. Kenyon, as executors of the last will of John S. Kenyon, deceased, & trustees of his estate under the will, shall enter in such circuit court on the

first day of its next session a copy of the record in such suit, copies of the process against petitioners, and of all the pleadings, depositions, testimony, and other proceedings in the cause, and shall pay all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in such suit if special bail was originally requisite therein, then this obligation shall be null and void; otherwise of force.

ERASTUS F. BROWN &
FRANCIS A. KENYON, [SEALS.]
As Executors of the Last Will of John S. Kenyon, Deceased, & Trustees of his Estate under the Will.

28 By JENKINS, ELLIOTT & WINKLER, [SEAL.]
Their Attorneys.

HARRISON LUDINGTON. [SEAL.]

In presence of—
CHAS. E. WILD.

STATE OF WISCONSIN, }
Milwaukee County, } *ss:*

I, Harrison Ludington, of Milwaukee, county of Milwaukee, and State of Wisconsin, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Wisconsin and a property-holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution.

HARRISON LUDINGTON.

Subscribed and sworn to before me, this 1st day of December, A. D. 1882.

CHAS. E. WILD,
Notary Public, Wisconsin.

(Endorsed:) Circuit court, Waukesha county. Filed Dec. 5, 1882. T. C. Martin, clerk.

Order for Removal.

THE STATE OF WISCONSIN:

Circuit Court, Waukesha County.

SARAH S. SUTTON
vs.
ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, dec'd, & Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, & Francis A. Kenyon.

29 Upon filing the petition of Erastus F. Brown & Francis A. Kenyon, as executors of the will of John S. Kenyon, dec'd, and trustees of his estate under the will, for removal of above-enti-

tled action to the circuit court of the United States for the eastern district of Wisconsin, and the bond thereto attached showing that all the proceedings for the removal of said above-entitled action into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Jenkins, Elliott & Winkler, attorneys for the petitioners, it is hereby ordered that said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the clerk of this court is hereby directed to transmit and deliver to the clerk of the circuit court of the United States for the eastern district of Wisconsin copies of the record and of the process against said petitioners and of all pleadings, depositions, testimony, and other proceedings in the cause, and that the bond annexed to such petition be, and the same is hereby, accepted and approved as to form and sufficiency of surety.

Dated Waukesha, December 5th, A. D. 1882.

By the Court: A. SCOTT SLOAN, *Judge.*

(Endorsed:) Circuit court, Waukesha county. Filed Dec. 5, 1882. T. C. Martin, clerk.

30 *Transcript of Record.*

Circuit Court, Waukesha County. May Term, 1883.

SARAH S. SUTTON, Plaintiff,
against
ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, and Francis A. Kenyon, Defendants.

Hurlbut & Van Alstine, plaintiff's attorneys.

29 JUNE, 1882.

Now comes the plaintiff, by her attorneys, Messrs. Hurlbut and Van Alstine, and files her summons and complaint in the above-entitled action.

29 June, 1882.—Affidavit for publication of summons filed.

29 June, 1882.—Order for publication of summons, with summons attached, filed and entered as follows, to wit:

(Title of cause.)

At a regular term of said court begun and held at the court-house in the village of Waukesha on the 23rd day of May, 1882, Hon. A. Scott Sloan, judge presiding.

On reading and filing the duly-verified complaint herein, showing that a cause of action exists in favor of the plaintiff and against the defendants, founded upon contract; that said cause of action arose in this State, and that the court has jurisdiction thereof; that

the subject of the action is real property in the county of
31 Waukesha and State of Wisconsin, and that the defendants have an interest therein, and that the demand consists partially in excluding the defendants from any interest therein. And on reading and filing the affidavit of Sarah S. Sutton, the plaintiff, made the 28th day of June, 1882, and entitled herein, showing that summons with the complaint annexed to be served therewith has been issued herein, and that the plaintiff is unable, with due diligence, to make service thereof upon any of the defendants; that all of said defendants are non-residents of the State of Wisconsin, and cannot, after due diligence, be found therein.

That the defendant, Erastus T. Brown, is a resident of the city, county, and State of New York, and that his post-office address is No. 307 East 124th street, New York city, State of New York.

That the defendant, Francis A. Kenyon, is a resident of the city, county, and State of New York, and his post-office address is No. 47 Walker street, New York city, State of New York.

That the defendant, James Kenyon, is a resident of Dundee, in the State of Michigan, and that [his] post-office address is Dundee, State of Michigan.

That the defendant, Maria S. Kenyon, is a resident of the city, county, and State of New York, and that her post-office address is No. 307 East 124th street, New York city, State of New York.

32 That the defendant, Elizabeth B. Kenyon, is a resident of the city, county, and State of New York, and that her post-office address is No. 307 East 124th street, New York city, State of New York.

That the defendant, Abigail B. Clark, is a resident of Colchester, in the State of Connecticut, and that her post-office address is Colchester, State of Connecticut.

That the defendant, Caroline B. Brown, is a resident of the city, county, and State of New York, and that her post-office address is No. 307 East 124th street, New York city, State of New York.

That the defendant, Francis A. Kenyon, is a resident of the city, county, and State of New York, and that his post-office address is No. 47 Walker street, New York city, State of New York:

Now, therefore, on motion of Hurlbut and Van Alstine, attorneys for the plaintiff, it is ordered hereby that the summons in this action, a copy of which is hereto attached, be served upon said defendants by its publication in the Wisconsin Free Press, a weekly newspaper published at the city of Oconomowoc, Waukesha county, Wisconsin, which is designated as most likely to give notice to said defendants, once in each week for six weeks, and that on or before the day of the first publication thereof the plaintiff deposit in the post office in the city of Oconomowoc, Waukesha county, Wisconsin, a copy of the summons, together with a copy
33 of the complaint, securely inclosed in an envelope addressed to each of said defendants at their respective post-office addresses, to wit: A copy of the summons and complaint addressed "Erastus F. Brown, No. 307 East 124 street, New York, State of New York." A copy of the summons and complaint addressed

"Francis A. Kenyon, No. 47, Walker street, New York city, State of New York." A copy of the summons and complaint addressed "James Kenyon, Dundee, State of Michigan." A copy of the summons and complaint addressed "Maria S. Kenyon, No. 307 East 124th street, New York city, State of New York." A copy of the summons and complaint addressed "Elizabeth B. Kenyon, No. 307 East 124th street, New York city, State of New York." A copy of the summons and complaint addressed "Abigail B. Clark, Colchester, State of Connecticut." A copy of the summons and complaint addressed "Caroline B. Brown, No. 307 East 124th street, New York city, State of New York." A copy of the summons and complaint addressed Francis A. Kenyon, No. 47 Walker street, New York city, State of New York; and duly pay the postage on each and every one of said copies before depositing the same in said post office, or that, at the plaintiff's option, a copy of the summons and a copy of the complaint be delivered to each of said defendants per-
34 sonally without the State of Wisconsin. And it is further ordered hereby, if service be made by publication, that the first publication be made within three months from the date hereof.

Dated June 29th, 1882.

By the court:

A. SCOTT SLOAN, *Judge.*

5 December, 1882.—Answer filed by Messrs. Jenkins, Elliott and Winkler.

5th December, 1882.—Notice of retainer filed.

5 Dec., 1882.—Admission of service of notice of retainer and answer filed.

5 Dec., 1882.—Petition for removal filed.

5 Dec., 1882.—Undertaking for removal filed.

5 Dec., 1882.—Order for removal made, filed, and entered as follows, to wit:

(Title of cause.)

Upon filing the petition of Erastus F. Brown & Francis A. Kenyon, as executors of the will of John S. Kenyon, dec'd, & trustees of his estate under the will for removal of above-entitled action to the circuit court of the United States for the eastern district of Wisconsin, and the bond thereto attached, showing that all the proceedings for the removal of said above-entitled action in the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion
35 of Jenkins, Elliott & Winkler, attorneys for the petitioners. it is hereby ordered that said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the clerk of this court is hereby directed to transmit and deliver to the clerk of the circuit court of the United States for the eastern district of Wisconsin copies of the record and of the process against said petitioners, and of all pleadings, depositions, testimony, and other proceedings in the cause, and that the

bond annexed to such petition be, and the same is hereby, accepted and approved as to form and sufficiency of surety.

By the court: A. SCOTT SLOAN, *Judge.*

Dated Waukesha, December 5th, A. D. 1882.

STATE OF WISCONSIN, } ss:
Waukesha County, }

I, T. C. Martin, clerk of the circuit court in and for said county of Waukesha and State of Wisconsin, do hereby certify that the foregoing copy of summons, complaint, affidavit for order for publication of summons, order for publication of summons, with summons attached, admission of service of notice of retainer and answer, notice of retainer, answer, petition for removal, undertaking on
36 removal, order for removal, and records have been compared by me with the originals, and the same are true copies of the process, pleadings, and all other papers in said cause, and the same are hereby transmitted, pursuant to the order for removal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Waukesha, Wis., this 18th day of December, 1882.

[SEAL.] T. C. MARTIN, *Clerk.*

End of record from State court.

Proceedings in U. S. Circuit Court.

February 19, 1883.—This day came the parties, by their counsel, and, upon their application that the court assign the time within which they shall take their testimony, it is ordered by the court that the complainant take her testimony within forty days from this date, that the defendants have forty days thereafter in which to take their testimony, and that the complainant have ten days thereafter to take her testimony in rebuttal.

April 5, 1883.—Depositions received from post office and filed.

April 14, 1883.—This day came the parties, by their solicitors, and filed their agreement, in writing, that the time for complainant to take testimony is extended to May 1, 1883; that if complainant's testimony be in on or before that date the defendants' testi-
37 mony shall be put in by June 10, 1883, and that complainant's rebutting evidence shall be interposed by June 20, 1883.

July 27, 1883.—One package of depositions, taken on behalf of the complainant before John A. Shields, U. S. commissioner, New York city, and also one package of depositions on behalf of the defendants, taken before the same commissioner, received per express this day and filed.

August 9, 1883.—Complainant's bond for costs in the sum of two hundred dollars, with Daniel McL. Miller as surety, filed.

December 13, 1883.—On motion of Jenkins, Winkler & Smith, defendants' solicitors, ordered, that this cause be, and hereby is, set down for hearing upon the pleadings and proofs therein at the next term of this court, commencing on the first Monday of January next.

January 7, 1884.—This day came the defendants, by their counsel, and moved the court to expunge the evidence and testimony of the complainant, Sarah S. Sutton, and also of the witness Charles T. Sutton, taken in this cause, and suppress the same for reason, filed, as follows:

Defendants' Motion to Expunge.

38 United States Circuit Court, Eastern District of Wisconsin.

SARAH S. SUTTON
vs.
ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors, &c., of John S. Kenyon, Deceased.

And now come the defendants, by their solicitors, and move the court now here to expunge from the testimony and record in this cause the evidence and testimony of the complainant, Sarah S. Sutton, taken before Francis Bloodgood, Esq'r, examiner in chancery, on the 12th day of October, 1883, and suppress the same upon the ground that the said Sarah S. Sutton, being the complainant in this action, which is against the executors of a deceased person to enforce an alleged contract made by such deceased person with the complainant, she, the said complainant, is incompetent to be sworn or examined as a witness upon her own behalf.

And the said defendants, in case the said above motion should not be wholly granted, move to expunge and suppress each and every question propounded to the witness — complainant relating to any transaction had personally between the complainant and the
39 said John S. Kenyon, deceased, and to expunge and suppress the respective answers to each of such questions upon the ground that—

First. The complainant is incompetent to be sworn or examined as a witness in this cause.

Second. That if she were competent to be sworn she is incompetent to testify as to any transaction between the said John S. Kenyon, deceased, and herself.

Third. That such evidence was offered after the defendants had closed their testimony, and was not in rebuttal of anything called out by the defendants.

And the said defendants also move to expunge and suppress each and every question in the examination of the said Sarah S. Sutton, especially objected to at the time of such examination, and upon the grounds then stated, and to expunge and suppress each and every answer to each and every question.

And the defendants also move to suppress and expunge each and every part of the answers of said Sarah S. Sutton, especially objected to at the time of such examination, and then noted, and upon the grounds then specified.

And said defendants also move to expunge and suppress each and every question propounded to the said Sarah S. Sutton, and each and every of her answer- thereto, or to anything that is not in rebuttal of the evidence produced by the defendants.

40 The examination of the said Sarah S. Sutton commences on page 530, and end- at page 589 of the printed book.

And the said defendants also move to expunge and suppress the testimony of the witness, Charles T. Sutton, upon the ground that the said witness is the husband of the complainant, and is not qualified to testify.

And the said defendants also move to suppress and expunge each and every question put to the said witness, Charles S. Sutton, and specially objected to at the time of the examinatfon, and upon the grounds then stated, and to expunge and suppress every answer to each and every such question.

The examination of the said Charles T. Sutton can be found in the printed book, commencing on page 589, and ending on page 597.

JENKINS, WINKLER & SMITH.
Solicitors for Def'ts.

September 15, 1884.—"On motion of Jenkins, Winkler & Smith, defendants' solicitors, ordered that this cause be, and hereby is, set down for hearing upon the pleadings & proofs therein, at the next term of this court, commencing on the first Monday of October, 1884."

41 December 15, 1884.—"On motion of Jenkins, Winkle & Smith, def'ts' solicitors, ordered that this cause be, & hereby is, set down for hearing upcn the pleadings & proofs therein at the next term of this court, commencing on the first Monday of January, 1885."

May 9, 1885.—Depositions received from F. Bloodgood, examiner, &c., and filed.

May 25, 1885.—This day came the complainant, by her counsel, and moved the court to admit the deposition of Joseph Scott, and to require the complainant to testify as a witness herein, as follows:

Motion of Complainant to Admit Dep'n of Joseph Scott.

Circuit Court of the United States, Eastern District of Wisconsin.

SARAH S. SUTTON, Complainant.
vs.
ERASTUS F. BROWN and ERANCIS A. KENYON, as Executors, etc., *et al.*

And now comes the said complainant, by Mess. Hurlbut and Van Alstine, her solicitors, and moves the court now here to receive and permit to be read the depositions of Joseph Scott (beginning at folio 1464 of the printed testimony), notwithstanding that the same was taken out of its proper order.

42 The complainant further moves the court to require the complainant herein to testify as a witness in this cause, pursuant to the statute in such case made and provided, and to receive and admit in evidence her deposition taken herein, beginning at folio 1524 of the printed evidence.

The complainant further moves the court to receive in evidence

the deposition of Charles T. Sutton, taken in this cause on behalf of the complainant, beginning at folio 1696 of the printed testimony, although in part not rebutting.

HURLBUT AND VAN ALSTINE,
Complainant's Solicitors.

WINFIELD SMITH,
Of Counsel.

And now at this same term, to wit, January term, 1885, and on the ninety-seventh day thereof, to wit, on the 25th day of May, A. D. 1885—present and presiding, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, assigned to said circuit, and the Honorable Charles E. Dyer, district judge—the following proceedings were had, to wit:

Hearing.

SARAH S. SUTTON, Complainant,
vs.
ERASTUS F. BROWN & FRANCIS A. KENYON, as
43 Executors of the Will of John S. Kenyon, Deceased, and Trustees of his Estate under the Will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, & Francis A. Kenyon, Defendants. } In Equity.

This day came the parties, by their counsel, Messrs. Winfield Smith and C. H. Van Alstine appearing for the complainant, and Mr. Jenkins for the defendants; and this cause came on to be heard upon the pleadings and proofs and was argued by said counsel, and, the hearing not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the ninety-eighth day of said term, to wit, on the 26th day of May, A. D. 1885, the same judges being present, the following proceedings were had, to wit:

Hearing Concluded.

SARAH S. SUTTON, Complainant,
vs.
ERASTUS F. BROWN & FRANCIS A. KENYON, as Executors of the Will of John S. Kenyon, Deceased, *et al.*, Defendants. } In Equity.

44 This day came the parties, by their counsel, and the hearing of this cause was resumed, and, being concluded, the court held the same under consideration.

And on said hearing the following testimony was read in evidence, to wit:

45 *Depositions of George F. Westover and Elizabeth Q. Westover.*

(Title of the cause.)

The above-named parties appeared before me, E. Rose Townsend, a notary public in and for the county of Cook, State of Illinois, at the city of Chicago, in said county, on this the 22d day of March, 1883, the complainant represented by her counsel, Edwin Hurlbut, and the defendants by their counsel, Jas. G. Jenkins, and before me agreed and stipulated that the testimony of George F. Westover and Elizabeth Q. Westover should be this day taken before me, and that the same when signed and returned to the clerk of the said court
46 may be read in evidence on the part of the complainant upon the trial of said cause, subject to all legal and proper objections for irrelevancy or incompetency; notice of taking said depositions being waived. The complainant appeared also upon the taking of said depositions, and was represented by said Edwin Hurlbut, Esq., and the defendants appeared and were represented by said James G. Jenkins, Esq.

GEORGE F. WESTOVER, first being duly sworn, testified as follows:

Direct examination by Mr. HURLBUT:

Q. Where do you reside, Mr. Westover?

A. I reside in the city of Chicago, State of Illinois.

Q. About how old are you?

A. Full age, between 40 and 50.

Q. Are you acquainted with the parties to this suit?

A. Not all of them.

Q. If either of them, state which and how long you have been so acquainted.

A. I am acquainted with Mrs. Sutton, the complainant, and have known her since 1868. I don't think I ever saw any of these who are defendants on the record.

Q. Were you acquainted with John S. Kenyon in his lifetime; if so, how long and to what extent was your acquaintance with him?

A. I was acquainted with Mr. Kenyon from April, 1868, until his death. Do you wish me to answer now the last half of that question, how much I was acquainted?

Q. Whether your acquaintance was intimate or casual.

A. When I became acquainted with him, in 1868, he was in the city of New York, and I was there. I met him there. I visited at his house, in Harlem. In the fall of that year, he visited my
47 house at Oconomowoc, Wis., where I resided, and his wife was with him. I saw him not more than once or twice after that until 1872, when he made his home at my house, and lived in my family nearly two years, at Oconomowoc. After that time expired, from 1874 until the time of his death I saw him whenever I went to Oconomowoc and he was there. I also saw him frequently here in our office in Chicago, and in our rooms in the hotel where we have boarded.

Q. You may state what you know, if anything, in relation to his

living with the complainant in Oconomowoc, and what relations existed between them in relation to their living in each other's family.

(Objected to by Mr. Jenkins as immaterial and incompetent.)

A. I first saw the complainant with Mr. Kenyon, either in New York or Brooklyn in 1868, in the spring. I know that she was at his house when I visited there. Mr. Kenyon and his wife, who was then living, were very intimate friends at that time with Mrs. Sutton, and, as I understood from them all, Mrs. Kenyon and Mr. Kenyon and Mrs. Sutton had been very intimate friends for many years. Mrs. Kenyon was an invalid. When Mr. Kenyon and Mrs. Kenyon were first at our house in Oconomowoc I learned from them both together more or less of that intimacy, and was told by them of the very great service that Mrs. Sutton had been to them both, more especially to Mrs. Kenyon. In 1870 Mr. Sutton and Mrs. Sutton went from New York to Oconomowoc to pay us a visit. Mr. Sutton was in exceeding ill health. They tarried there awhile and returned to New York.

Q. Did Mr. Kenyon come to Oconomowoc at that time?

A. In the summer of 1872 Mr. Sutton and Mrs. Sutton and
48 Mr. Kenyon came together to our house at Oconomowoc. Mrs. Kenyon had died previous to that, and Mr. Kenyon was then a widower, without children. Mr. Sutton at that time was very low, and it had been resolved that he and Mrs. Sutton would make Oconomowoc a permanent home, or at least would try the experiment of making it a home, and they went to Oconomowoc at that time with Mr. Kenyon for that purpose. I had agreed that Mr. and Mrs. Sutton might make a home in my family. When Mr. Kenyon came with them he asked me if he could board with us, so that he might be with Mrs. Sutton. I told him that we did not keep boarders, and did not want to be under obligations to perform the various little offices that boarders in a family would expect. He said that he wanted nothing of us but food and a bed. That all other wants which he would require, attending to his clothes and personal needs, would be done by Mrs. Sutton. I knew then and conversed frequently with Mr. Kenyon and other members of the family about the present and the past relations between Mr. Kenyon and Mrs. Sutton. I knew from information which they gave us, after they made our house their home, that Mrs. Sutton had—

Mr. JENKINS: Was that from Mr. Kenyon?

A. It was conversed in the presence of Mr. Kenyon and Mr. and Mrs Sutton, and to my family frequently. It was a matter of frequent conversation, as they lived a long time with us and became very intimate, and very frequently the family relations and the old family histories were talked of. I was informed in that way perfectly of what had passed, so far as I know, and thus I learned that Mrs. Sutton had for many years been, as it were, a member of his family; that she had nursed and taken care of his wife during his wife's

last sickness in New York (Mrs. Kenyon having died previous
49 to that); that for a great deal of the time Mrs. Sutton had staid exclusively at Mr. Kenyon's residence; and I also learned, what perhaps would not be material, of the various expressions of desire to her relative to Mrs. Sutton, that had been made by Mrs. Kenyon previous to her death. Possibly I should not relate those; I don't know. Mr. Kenyon then entered into our family. He paid me or Mrs. Westover a weekly stipend to cover what I thought would be the extra expense to us by his being in the household. He was not well; he never was well since he first went to Oconomowoc. He was a pretty old man then; that is, he appeared to be a pretty old man. I didn't know his age. He was at least old enough to be Mrs. Sutton's father; older, I should say, than her own father was. During the two years that he lived with us Mrs. Sutton was his almost constant companion. He needed a great deal of nursing and attention. He suffered frequently with violent attacks of headache. There were premonitions in him of brain decay, and he himself felt and apprehended that he was in danger; that is, at times. At other times he was hopeful and cheerful. He wanted more attention and care when near Mrs. Sutton in the little details of life than any man I ever saw. He was very fond of fishing, and I think that nine times out of ten Mrs. Sutton accompanied him when he went fishing. He seemed to dread to be alone. He was fond of riding. I kept horses; he had free use of the horses and carriages. I drove a good deal, and he went out with me sometimes. Generally, however, Mrs. Sutton accompanied him. They always went together to church, to Sunday school, to meetings, and, in fact, everywhere, and whenever he was sick she nursed him, which was very frequent. She devoted the most of her life during those
50 years to him, as a daughter to a father. She filled the place that an exceedingly attentive daughter would to a weak, sickly, old father. I never saw a case in a family of more marked service in that line than was that case. Mrs. Sutton took full charge of his wardrobe and linen. No person but Mrs. Sutton was relied upon to look after his personal wants at all. Mrs. Westover gave him no attention further than to see that he had food to please him and a bed to ease him. In the spring or summer of 1874 my family removed to Chicago from Oconomowoc, and Mr. and Mrs. Sutton went to reside in a small cottage in Oconomowoc, on Main street. Mr. Kenyon resided with them there. After they had been there, I don't know exactly how long, two or three or four years, anyway, and and two or three years before his death, Mr. Kenyon furnished a house in New York, where he went and kept house himself during the winter season, or a few months in the winter. Mrs. Sutton was his housekeeper there in New York whenever he was there; that is to say, they all went to New York together.

Mr. JENKINS: Are you stating what you know yourself?

A. I know that when they went to New York they came through here and stopped at my house, at my rooms. I knew when they went and when they came back, and I knew from what they had said where they had been, as well as where they were going, but I

don't know that I was ever present in that house in New York. I was frequently at Mrs. Sutton's house in Oconomowoc after I removed to Chicago. She kept house. I frequently saw Mr. Kenyon there, and I saw the same relations existed between them as had existed when they all lived with me. I was there several
51 times when Mr. Kenyon was sick, and Mrs. Sutton was performing all the same services for him then that she had when they lived with me. That is my answer to that question as to the relation of the parties; as to the prior question about my own acquaintance with him, I was his attorney in one matter he had, if you wish me to tell that; I acted as his attorney for him once in a matter he had in Chicago; that was when he was living with me, and I made two journeys to Chicago here on his account in that business.

Q. Now, Mr. Westover, you may state what you know of your own knowledge or by statements of Mr. Kenyon to you in relation to the provision that he was to make or did make for Mrs. Sutton's future home in Oconomowoc.

(Objected to as immaterial and improper.)

A. I can give a short history of what I know about the recompense which he proposed to give, or did give, if he gave any, to Mrs. Sutton; I have had many conversations with Mr. Kenyon; he used to talk with me about his matters, private matters, considerably; he was not a man, however, who talked generally about his affairs; to most people he was very reticent and he talked very little to me until I had known him many months, perhaps a year; while he was living at my house he and I went together to Ripon, Wis.; he went to see a family that was connected with him——

Q. Was that before the spring of 1874?

A. Yes, sir; I went to see a family there by the name of Akin; I think we were gone two or three days in Ripon; I went with him to call upon those relatives of his; when we returned, on board the train, on the way from Ripon to Watertown, between Ripon and Oconomowoc, the subject came up of his family, his relatives;
52 first that arose by way of reference to the visits we had just made; he began by asking me what I thought of those people in Ripon, and then we conversed a long time, sitting together in one seat in the car; he said to me, among other things, that he had no relatives that were really worthy to be considered relatives, with a very few exceptions; he told me he had a very large number of relatives; he said, "You have seen what they are in Ripon, and you have seen those in Chicago; the rest are nearly all very much like them;" he further said he had a few that were exceptions; he remarked, "All they want of me is my money; some day they will be terribly disappointed;" he then said that no one had filled the place of a relative to him as had Mrs. Sutton; that she was the only one in the world who had been really to him like one of his family, and that he was under very great obligations to her, and how to discharge it, to repay her, or attempt to repay her, was something that he was considering; he did not know what to do; he felt doubtful of the best course; I said to him, "Uncle John (all the family called

him Uncle John), whatever you do, do it some other way than a last will and testament; my experience is, Uncle John, that people who pay their debts by a last will never pay their debts at all;" then he said he had seen so much trouble and contention over wills that he was well aware that that was an unsafe course sometimes by which to make proper provision; he said, moreover, in the conversation that he was going to make recompense to Mrs. Sutton for her services to him in some way; he did not know how it would be; that is the sum and substance of that conversation; of course the conversation occupied several times as much time as I have occupied now in detailing it, but that is the substance of it; after that the
53 subject was conversed upon by us (by Mr. Kenyon and myself) occasionally; that is, for a few times previous to about June, 1881—in June, 1881; that was the time I was at Oconomowoc. The conversation related to took place, I think, in June, may be in July, but I think in June. I know the time, because I know it was a little previous to my departure for Mexico, on the last visit that I made to Oconomowoc before I started for Mexico, for that was one of the subjects of our conversation, my proposed trip. I saw Mr. Kenyon at the house of Mrs. Sutton. When I went there he was alone, sitting in the small parlor on the southeast side of the house. I had a long conversation with him at that time. I had heard that he had made a purchase of this Breck place. It is the place that is described and in dispute in these proceedings. That place was formerly owned by Samuel Breck. I knew him well. The place was called the Breck place. I knew the place well. I have been on it probably more than a hundred times.

Q. You may look at the description.

A. It is the place where Mrs. Sutton now resides. I had heard that Mr. Kenyon had bought that place. I don't think I had seen him previous to that, after he had purchased it. I don't recollect just at this moment, but anyway I asked him about the place, and he told me then that that was the final result of his determination as to Mrs. Sutton; that he had bought the place for her; that she wanted it, and he had made up his mind that it was the very best that could be done, and he had promised her that he would put a house on the place, such as she wanted, and the place should be hers. He said that it was not perhaps as much as Mrs. Sutton was really entitled to, but he thought that after all it would be better for her than if she should be provided for in some other way that
54 would be even larger. He said that he had made her home his home, as I knew, and it was understood that he was to continue thereafter making his home with Sortie. (That is, Mrs. Sutton. We all, that is, my family and Mr. Kenyon, called her Sortie; sometimes he called her Sarah). I talked a long time with him, and he said it was not sufficient for her, really, but the idea was this: It was situated on the lake; would make a pleasant place for her; that by having a fine building or buildings on it that she would be able, if anything should happen to him, to take care of herself by keeping boarders. It would be a good place for summer boarders. I asked him what sort of a house was going to be built

upon it. Well, he said, that is not thoroughly settled. The house will be such as Mrs. Sutton wants. I have agreed that Sortie shall have the house just exactly as she wants it; just to suit her.

Q. That was part of the provision, as I understand, that he was to make?

A. He said he was to continue to make his home with Mr. and Mrs. Sutton, and that, in view of the past and her services to him, and what had been done, and in view of the position which she was occupying as to him and the services she had performed and was still to perform, he had promised her that place, and he had bought it for her because it pleased her, and he had promised to build such a house thereon as she should want. Then I asked him about the house. He said that she should have just such a house as she wanted. I asked him if they had the plans drawn. He said that he thought that Charlie and Sortie had pretty much settled on their plans.

Q. Who is Charlie?

A. He is Mr. Sutton, Sortie's husband; and that Charlie had been for a long time himself drawing plans for the house. I flouted that idea of Charlie's being the architect. I told him that they
55 had better get a person that knew something more of it. Well, he said that was for them to say, but he had rather they would make their own plans first, and then they would be just what they wanted. After some little time during that visit while I was there, before I left the house, Mr. Sutton and Mrs. Sutton both came into the room. Mr. Kenyon said: "Charlie, won't you please get your plans that you have drawn of the house and show them to George?" Mr. Sutton went out of the room and came back with a roll of papers on which he had the plans drawn for the house. The plans were drawn on, I should say, two feet and a half square paper or more. They laid them down upon the carpet, and Mrs. Sutton and Mr. Sutton and Mr. Kenyon and I gathered around in a circle to look at the plans. We talked a very long time and discussed every detail almost of the plans from the basement to the attic, and very many minor changes were decided upon then and there. In all that conversation Mr. Kenyon asked questions, as I did, invariably. He asked Mrs. Sutton how she was going to have this and how she was going to have that. Mr. Sutton is considerable of a mechanic naturally, and a good draftsman. Mrs. Sutton explained to me about the accompanying plans, to my recollection, how she was going to have the house. I would object and criticise and find fault, sometimes in earnest, generally to see what she would say about it, and she would go on further and explain. She located what was to be her room in the house—located what was to be the private stairs to the chambers. I think that we spent over an hour and a half or two hours—not less than an hour and a half—in conversation about the house. Mr. Kenyon did not say anything there about the conversation which he had just held with me, but
56 he went on talking about the house as though he and I had had no conversation as far as that was concerned.

Q. The house that was built was constructed after that plan?

A. Yes, sir; after that plan.

(All the foregoing evidence is objected to by the defendants as incompetent and irrelevant.)

Q. Mr. Westover, you may now state what you know, if anything, in relation to the complainant's having carried out the understanding between them on her part and what Mr. Kenyon did in relation to the completion and carrying out the understanding and the contract on his part; state fully.

(Same objection.)

A. During my visit at Oconomowoc at that time, the most of which time I spent at Mrs. Sutton's house, I asked Mr. Kenyon about the deed of the premises, whether he had deeded them to Mrs. Sutton. He told me that he had not yet deeded the premises to Mrs. Sutton; that at first he had thought not to deed the premises until the house should be finished, and that he said was really the understanding between him and Mrs. Sutton; but he said, however, he thought that the place should be deeded right away, and that he was going to deed it as soon as he could get it in shape. He then explained to me that there was a man who owned a piece of land directly south of these premises and lying between the premises and the highway. These premises do not lie on any highway. There is, however, a line of roadway belonging to the premises leading from the highway back into the grounds. Now, Mr. Kenyon explained to me that his desire was that that piece of ground intervening between the premises and the highway should also be purchased and added to the property, and he told me that he was negotiating
57 in some way or other with the man who owned those premises, who owned that intervening tract of land, to buy the land, and the reason he had not bought it, and the reason it was not settled, was that the man had been exorbitant in the demands as to price, and he had tried some way to purchase through some third party; that he thought that he would be able to buy it in a little while, and after he should buy that, if he should succeed in buying it, he then would make the deed without waiting longer. At least that that was what he was delaying for, to see if he could not buy that piece of land. I don't know of any other acts now by My. Kenyon towards fulfilling what he said he had promised to Mrs. Sutton. I know, as I have already testified, that Mrs. Sutton continued to fill towards him the offices of a member of his family, as a daughter, as I have already described, up until the time that they went to New York, the last time they went to New York. He never returned. I saw them then. I went with Mr. Kenyon to the railroad office to purchase the tickets. He was in our office, here in Chicago, also at that time, and he went to our rooms at the hotel. I guess I didn't see him there.

Q. Was the plaintiff with him?

A. Yes, sir; and Mr. Sutton. I remember further conversation by Mr. Kenyon, when we were talking together at Oconomowoc in June, 1881, in which he mentioned Mr. Sutton. Shall I state it?

Mr. HURLBUT: Go on.

A. When we were conversing about the matter he said that he was opposed to idleness, and that it was not his desire or wish that Mrs. Sutton or any one else should be made simply to go around with nothing to do. He always in early life had been a hard-working man himself, and it was proper that others should. He
58 said that Mr. Sutton could not do much; that his health was poor, and he did not think Mr. Sutton would live very long, and that, if he did live, he would never be of much account towards getting a living for himself and Sortie, on account of his health, and that therefore that was one reason he had for early making this settlement and arrangement with Mrs. Sutton, and for having this property put in shape, so that it would be in itself a support sufficient to take care of her, with her own labors, regardless of any assistance or help from Mr. Sutton.

Q. Now, Mr. Westover, I ask you to state what you know, if anything, in relation to what had been carried out in the completion of the building, or anything at that time, in pursuance of this arrangement?

(Objected to.)

A. I know that the house was commenced after the plan which was shown to me—that I have already testified to—and I know that it was partly constructed, and that it stands now unfinished, enclosed, or partially enclosed, and I know that Mr. Sutton, long before the house was built, went there and erected a boat-house. I know that Mr. Sutton moved an old house that was on the place at the time it was purchased, moved it from the old foundation upon the new foundation, and that he repaired the house and fixed it up, overhauled it from top to bottom. When I was there, in the fall of 1881, he had moved his boats and some furniture on the place, and he kept his horse and wagon there and various things he had. That was the fall of 1881. I think that the boat-house was built long before that. When I went there in 1881 it was up, and the things were in it. Mr. Sutton was engaged there then in fixing up the place, changing it, making improvements and giving directions to the men.

59 Q. Will you state about what you know as to the fact of and about the extent of Mrs. Sutton and her husband being in possession of the premises before they went down to New York?

A. Well, that is what I know. There was no one in possession but them, Mrs. Sutton and Mr. Sutton. Mr. Sutton, at the time, was acting—I can only tell—I know what he was doing. He had sole charge and possession of the place. I was there at the place with both of them. That was the time before they went to New York, the last time I was with them at the premises. Well, they went to New York, I forget how late in the fall. It was the fall of 1881. It was late in the fall or early in the winter; I can't tell.

Q. Was that previous to their going that you speak of your seeing Mr. Kenyon at Oconomowoc?

A. Of course, because I never saw him there after that. The boat-house was constructed, and Mr. Sutton had his things there on the place a long time, perhaps many months or a year, before they went to New York. Some furniture was there and their horse was kept there. It was there when I was there. They had a barn there. I know it was the intention——

Mr. JENKINS: Mr. Westover, state either the facts or state conversation.

A. Well, then, I say that I know that when the parties were here in Chicago, when they went to New York the last time, that they told me——

Mr. JENKINS: Who are they?

A. Mr. Kenyon and Mrs. Sutton and Mr. Sutton. They were all together. They were together nearly all the time while they were here, except when Mr. Kenyon went to the office to get the tickets. I met them at the depot when they arrived from Oconomowoc, and we all came from the depot together, and Mrs Sutton told me, I think it was Mrs. Sutton, that when they returned in the
60 spring they were going to live in one of the houses, live in the little house on the Breck place. That is the only way I know.

Q. Was Mr. Kenyon by?

A. Yes, sir; he was. I am not quite certain but he also said it. I am not positive which one did say it, but I know it was said by one or both of them.

Q. Do you know anything further that would be of benefit to the parties? If so, state.

A. I don't think of anything.

Q. What relation, if any, is the complainant to you?

A. The complainant is a sister of my wife.

Cross-examination by Mr. JENKINS:

Q. Mr. Westover, how old a person is Mr. Sutton?

[A.] I don't know. I can give my opinion from an intimate acquaintance. I think he is about 48.

Q. And how old a person was Mr. Kenyon?

A. I think Mr. Kenyon—I never heard his age, and I must state from appearances. He appeared to be a man a little under 70.

Q. When did you first see Mr. Kenyon?

A. In April, 1868. He then lived at Harlem, on the banks of the East river.

Q. Was he at that time engaged in business?

A. No, sir.

Q. In what business did you understand he had been engaged in?

A. He was a saddler once, but he had been—and now I recall, perhaps, something that will modify my first answer. He had an interest in a bank at Harlem, and was one of the officers of the bank, and when I saw him first I think he was an officer, and he continued to be an officer of the bank for many years, and he may have

been to his death, for all that I know. He did not give any
61 active services to the bank except during a short time twice a year, every January and July—that is, the first of every January and July.

Q. How did you happen to get acquainted with Mr. Kenyon and go to his house in the spring of 1868?

A. Well, I was invited to his house with my wife. My wife was a member of the Miller family.

Q. Who were the Millers?

A. Mrs. Sutton was a Miller, and the Miller family were intimate with that family—the Kenyon family. Mrs. Sutton at that time was living with her mother in Brooklyn.

Q. And what was Mr. Sutton at that time?

A. He was a clerk; in my recollection he was a clerk in the store of A. M. Hayes & Co., on Maiden Lane, New York.

Q. And when, if you know, did Mrs. Sutton become an inmate or take up her residence with the family of Mr. Kenyon first?

A. I don't think that Mrs. Sutton had formally changed her residence from her mother's house to Mr. Kenyon's, in New York, at all. I think that she spent a great deal of her time, every day and night, perhaps, for weeks and months at a time, without going home. I don't know that, only they have told me.

Q. Was Mrs. Sutton, then, an intimate friend of the family in that way up to the time of their removal to Oconomowoc, when Mr. and Mrs. Sutton removed to Oconomowoc in the fall of 1868?

A. The Suttons moved to Oconomowoc in 1872.

Q. Now, from 1868 up to 1872 did you see Mr. Kenyon?

A. Well, I think I saw him afterwards. I saw him in New York, and I saw him the next fall—that was the fall of 1868—at our house in Oconomowoc.

Q. Was he alone; did he come alone?

A. His wife was with him; he took her the trip to see if——

Q. And how long did they remain at Oconomowoc
62 at this time?

A. I don't recollect how long; not long; may be a week.

Q. Where were they at Oconomowoc?

A. At my house.

Q. When did you next see them, Mr. Westover?

A. I never saw Mrs. Kenyon after that.

Q. She died in the spring of 1872?

A. I am informed she died in 1872.

Q. When, after that fall of 1868, did you next see Mr. Kenyon?

A. After Mr. Kenyon was at my house in Oconomowoc I think I saw him once before he came to Oconomowoc to live in 1872, and that was at New York.

Q. Now, when was it in 1872 that Mr. Kenyon came to Oconomowoc?

A. In the summer time.

Q. Mr. and Mrs. Sutton came with him?

A. Yes, sir.

Q. In what business, if any, did Mr. Sutton engage in Oconomowoc then and there at that time?

A. Well, the only business he engaged in was moving around a little for his health. He did not go into any business. Mr. Sutton was not able to walk two blocks; he had to be taken from the depot to the house in a carriage.

Q. Mr. Sutton was in ill health?

A. Yes; very. It did not seem as though he would live at that time.

Q. They came and lived with you?

A. Yes, sir.

Q. At the same time Mr. Kenyon came to live with you?

A. Yes, sir.

Q. And when was it you removed from Oconomowoc to Chicago?

A. In the summer of 1874.

Q. What time in the summer of 1874?

A. Well, I came here personally the first of May.

Q. And when did you break up housekeeping?

63 A. Not until 2 or 3 months after that. My family came two or three months after I did.

Q. Did Mr. and Mrs. Sutton and Mr. Kenyon remain with your family in Oconomowoc up to the time that your family broke up there in the summer of 1874 to move to Chicago?

A. I think about that time. I don't think they did up to the very last.

Q. What were the pecuniary circumstances of Mr. Sutton at the time of his removal to Oconomowoc in 1872?

A. Well, I don't know; that is to say, I don't know "by the card." I never heard him talk and he never spoke to me about his pecuniary business in the world. He had money all the time; appeared to have money of his own. I don't think he had much, but he had enough for their existing needs.

Q. Now, from the time Mr. Kenyon came, in the summer of 1872, and resided with you, until 1874, Mr. Kenyon paid you the amount agreed upon for his living with you, Mr. Westover?

A. Yes, sir.

Q. And what amount was that?

A. Ten dollars a week.

Q. Can you give me the month or months, or say the date of that conversation with Mr. Kenyon on the train from Ripon?

A. I have been trying to think when that was. I have no means of fixing that date, but it was—it must have been the last part of the year 1873 or the first of 1874; I don't know which.

Q. You remember the season of the year?

A. No; I don't recollect the season of the year. I know the weather was mild, and I know it was not cold weather. I don't know whether it was spring, summer, or fall; it was not winter.

Q. Was it while Mr. Kenyon still remained in your family; was it before or after you had come to Chicago yourself, before the first of May, 1874?

A. Yes, sir.

64 Q. When you broke up in Oconomowoc and came to Chicago to what place did Mr. and Mrs. Sutton move?

A. They moved to the cottage, where they continued to live all the time they were there, until the fall of 1881. It is on Main street, on the banks of the same lake—La Belle Lake—that borders the Breck place.

Q. Who owned that place?

A. Mrs. Sutton. I don't know that she owned it when they went there.

Q. Do you know the description of that lot?

A. No; I don't know it.

Q. Would you know it?

A. Probably I might if I could see it.

Q. Could you recognize it by the number?

A. No; but I can locate it, though. I had something to do with the purchase of it, but I den't recollect the description.

Q. Did Mrs. Sutton obtain title to that lot?

A. I don't know when she obtained title, but it was some time after they removed there.

Mr. HURLBUT: I don't think that is material. I object.

Q. Was that lot to which they moved known as lot No. 70 in the village of Oconomowoc?

A. Can't tell that. It was the lot which was formerly owned by Mr. J. C. Hitchcock.

Mr. HURLBUT: Previous to that time by David W. Small.

Q. To whom did J. C. Hitchcock convey that lot?

WITNESS: If you have any deed that I made——

Mr. JENKINS: Here is a certified copy. It was witnessed by you. (Deed presented to witness.)

A. That was the deed to John S. Kenyon.

Q. When?

A. In April, 1874.

Q. Mr. and Mrs. Sutton went with Mr. Kenyon to live on this place described in that Hitchcock deed at or about the time you moved to Chicago, did they not?

65 A. I think they all went together to live in that house about that time.

Q. And continued to live in that house up to the time of Mr. Kenyon's death?

A. Yes, sir.

Q. Now, after that conversation you had with Mr. Kenyon in the spring of 1874, when after that did he speak to you upon the same subject of making provision for Mrs. Sutton prior to this time in June, 1881, which you have referred to?

A. I can't fix any date; I know of nothing that will fix the time, but I had several conversations with him.

Q. Was Mr. Kenyon in Oconomowoc during the summer of 1874?

A. Yes; part of the summer.
Q. Where was he the rest of the summer?
A. In New York.
Q. And what part of the summer was he in New York?
A. About the first of July.
Q. When did he return?
A. Well, I don't know. He went most every year about that time. Once or twice during 9 or 10 years he stayed a little longer time than usual. He generally returned after a few weeks. I don't recollect in 1874 whether he made a long or short trip.
Q. Mr. Westover, after you removed here how often did you go to Oconomowoc after you moved to Chicago?
A. Well, during the first year or two I was there often; part of the time every few weeks; during the second year not as often; several times during the second year, and more or less times every year, but the times grew less frequent all the time.
Q. This last occasion that you refer to, in June, 1881, was when you were about to leave for Mexico; when did you go to Mexico, and how long were you absent?
A. I think I went the first day of August.
Q. And when did you return?
66 A. In about six weeks or less.
Q. Was Mr. Kenyon in the habit of spending his winters in New York?
A. You mean previous to the time he fitted up the house there? He went to New York for a long or short stay nearly every winter.
Q. When was it that he fitted up the house in New York?
A. My recollection would be that he fitted up that house somewhere about the year 1879.
Q. When he went to New York in 1879, 1880, and 1881 did Mr. and Mrs. Sutton accompany him?
A. Yes, sir.
Q. Did Mr. and Mrs. Sutton live with him in New York?
A. I so understand.
Q. Did you ever understand that Mr. or Mrs. Sutton, or either of them, paid any board while they were living with him in New York?
A. I never understood that they did.
Q. Have you ever understood that they did not?
A. That is my understanding.
Q. In Oconomowoc, from the time that Mr. and Mrs. Sutton and Mr. Kenyon left your house up to the time of Mr. Kenyon's death, did you not understand that he paid to Mr. Sutton his board while he lived with them?
A. No, sir.
Q. How did you understand them?
A. I know he did not. I know that he contributed for the expense of the family—for the actual cost of living.
Q. What was the amount paid in by Mr. Kenyon?
A. I think it was $10 a week, the same as he did to us.
Q. Who did you learn this from?

A. From all of them.
Q. From Mr. Kenyon?
A. Yes, sir.
Q. When were you at Oconomowoc after June, 1881, the occasion to which you have referred?
A. I was at Oconomowoc immediately after my return
67 from Mexico.
Q. Was Mr. Kenyon there?
A. I think so.
Q. Do you remember of seeing him there?
A. I think he was there at that time; I would not be positive about it. I recollect the circumstance of going with him over to that place, but it is hard for me to say whether it was fall or summer.
Q. Did you at any time, after June, 1881, go with Mr. Kenyon to this Breck place, where the house was being erected?
A. I am not quite positive that I did go with Mr. Kenyon.
Q. How often have you been there from June, 1881, up to the time of Mr. Kenyon's death?
A. Between that time and January, 1882, I was not at Oconomowoc more than once or twice.
Q. Did you at that time see that house on the Breck place, or either of those times?
A. Yes, sir.
Q. How far had it been progressed at that time?
A. Only a little way.
Q. How far?
A. Well, when I saw it I think they were working on the foundation.
Q. In the fall of 1881?
A. Yes. They had some timber there, and they may have been working on it, but the house was not erected at that time, in the fall of 1881. It was not erected when I first saw it, and they were working at it. I didn't see the house after that until after Mr. Kenyon's death. The old building was repaired at that time.
Q. The house was not finished at Mr. Kenyon's death, was it, Mr. Westover?
A. No, sir.
Q. You have spoken of an old house on that place at the time Mr. Kenyon purchased it. Will you state, if you please, what the character of that house was, as to its size, &c.?
A. Well, it was about a six or seven room cottage, of poor frame construction.
68 Q. What sort of a house was it?
A. It was a poorly-made house; pretty good frame-work to build a house on.
Q. What was done with that house at the time the new structure was commenced?
A. That house had been, previous to the commencement of the new structure, removed from its old site and put on a new foundation and fixed up.
Q. How was it occupied up to the time of Mr. Kenyon's death?

A. It was locked.

Q. Who had the keys, if you know?

A. Mr. Sutton had them when I saw them.

Q. When?

A. He had them when I was there at that house. He always had them, and I was there once or twice.

Q. Who had the keys prior to Mr. Kenyon's death?

A. Mr. Sutton had them when I saw them.

Q. Do you know where Mr. Sutton got the keys at the time you saw him with them?

A. No; I don't know. He appeared to have them in his pocket.

Q. How many times did you see him with the keys prior to Mr. Kenyon's death?

A. Well, I don't think I went to the house more than twice. He had them whenever I went there.

Q. When they all went to New York in the fall of 1881 who had the keys, and what were done with them?

A. I don't know.

Q. They didn't confide that to you?

A. They didn't say anything about the keys.

Q. Now, Mr. Westover, will you please state, with reference to that interview in June, 1881, just what Mr. Kenyon said and just, as nearly as you can, the exact language that he used?

A. I can't; the conversation was too long.

69 Q. How long was that conversation before Mr. and Mrs. Sutton came in?

A. More than an hour.

Q. Did your conversation relate fully to this subject of provision for Mrs. Sutton?

A. Mostly.

Q. What other subjects were talked upon?

A. We talked about my intended trip to Mexico, talked about his health, talked about Mr. Sutton's health about that time, talked about the cottage where they were living, and talked about boats; most of the conversation was relative to the subject of this place and Mrs. Sutton.

Q. Well, now, will you tell me, as nearly as you can, just the exact language that Mr. Kenyon used in reference to this provision for Mrs. Sutton and the order in which it occurred?

A. Well, I will do the best I can; I think I introduced the subject of the house myself by asking him about it—what he was going to do; I heard he had bought the place, and I broached the subject of the place to him; he said that he bought for Sortie; he said that Sortie liked the place very much and she wanted it, and that he thought that would be a good thing for Sortie to have; he says, "It is understood," quoting him as near as I can, "between me and Sortie that I shall continue to live with her as I have done, and I have promised her this place. It is not a sufficient reward for her, or so much as perhaps she ought to have for what she has done and will do for me;" then, of course, he said "you know all about that." Of course, I thoroughly under-

stood the relation between him and Mrs. Sutton, and what the nature of the services she had performed and was performing was. He referred to them, and he said, "I think that is the best way we could have arranged it; it will provide her means to make a living; I have promised to build such a house and fix the place up as she wants it; she is to have it just as she wants it, and the idea I
70 have is by fixing up the place and putting on good buildings that, in the future, Mrs. Sutton, if anything should happen that she should be left alone, can take good care of herself; that place will always support her." He reminded me of what he had said to me before on our prior conversation on the same subject and said that after much thought he had concluded that that was the best arrangement, and she had agreed to it; that it was arranged between them that he should continue to live with her in the future, and I know at that——

Mr. JENKINS: Just give his conversation, his statements, not what you did or didn't know.

A. Well, he did on that occasion, as I have already told you, say to me that I knew about the relations between them and what Sortie was doing for him, "you know it yourself," or words to that effect; that was the substance of what he said, and the conversation was long and in detail.

Q. When, before that June, had you seen Mr. Kenyon last?

A. Well, I don't know, I saw him frequently from 1874 to 1881.

Q. How frequently?

A. Several times every year at Oconomowoc, and he never went through here without stopping to see us but once or twice, and he went through here four times a year.

Q. Now, have you given the substance of that talk to you in reference to the provision for Mrs. Sutton and with reference to this place?

A. Yes, sir; I have given the substance of all he said.

Q. Have you given the substance of all he said?

A. In reference to what she had done for him?

Q. I mean with reference to the provision for Mrs. Sutton and with reference to this place?

A. I think I have; he said that he was under obligations to Mrs. Sutton, as I knew all about; he detailed to a considerable
71 length, as he had before, in praiseworthy terms concerning what she had done for him individually and how he was indebted to her, and that he had made arrangements with her and she would continue to do for him as she had done, and he had promised to buy that place for her and fix it up and deed it to her.

Q. When did he say that he had made that promise?

A. He didn't say.

Q. You speak in your direct testimony of a piece of land lying between this Breck place and the highway. Do you know whether Mr. Kenyon ever acquired the title to that piece?

A. I think he never did.

Q. How intimate were Mr. Kenyon's relations to you and his confidences with you?

A. With me?

Q. Yes, sir.

A. I don't think he ever talked with any one about his own matters as freely as he did with me. I don't know.

Q. When did you first know that Mr. Kenyon had made a will?

A. After he died.

Q. And in all these conversations that he had with you respecting Mrs. Sutton he never told you that he had made some provision for Mr. Sutton by his will, did he?

A. No, sir.

Q. Now, Mr. Westover, what acts of possession did you say that you observed on the part of Mr. and Mrs. Sutton with respect to this Breck place?

A. I observed that Mr. Sutton took charge of the place; that he was supervising it according to his or Mrs. Sutton's desires; that he was apparently employing and discharging help, making contracts, grading the grounds, fixing the house, and otherwise improving the premises according to, as far as I could see or hear—according to his own or his wife's wishes solely, and I know that he had placed many of their things upon the premises; that he had his boats
72 there, kept them there, and that they had Mrs. Sutton's horse and buggy there in the barn, and Mr. Sutton had various farming tools and implements there which I saw. They also had some furniture there in this old house. They had commenced in the fall of 1881 to move some of their things to the house that had been refitted. They moved them from the cottage on Main street, but that I don't know of my own knowledge, only what Mrs. Sutton said. I can't say that they had had the things there in their cottage, only as they told me. I did see them in the old house on the Breck place.

Q. Who had the key of the boat-house?

A. Mr. Sutton.

Q. From the facts you have stated, you said, did you, that Mr. Sutton was in possession of the premises?

A. Well, generally. Mr. Sutton appeared to be in possession of those premises and as much as any person can be in possession of such premises.

Q. When Mr. and Mrs. Sutton went to keeping house, upon your removal from Oconomowoc to Chicago, in 1874, who furnished that house into which they moved?

A. Mrs. Sutton.

Q. With new furniture?

A. They had their furniture brought on from the East, and some they bought afterwards.

Q. Now, who built the boat-house on the new place?

A. Mr. Sutton.

Q. Who paid the bills?

A. Mr. Kenyon.

Q. Then what do you mean when you say that Mr. Sutton built it?

A. Well, I mean that Mr. Kenyon paid the expenses of that, as he had told them he should do.

Q. What did Mr. Sutton have to do about building it?

73 A. He planned it according to his own choice, and solely located and designed it and directed its construction.

Q. How do you know that?

A. Because I went to look at the boat-house and saw it, and both of them, Mr. Kenyon and Mr. Sutton, told me all about that.

Q. Who built it in fact; who did the work?

A. Mr. Sutton built most of it with his own hands. He employed all his time on that place. I don't know that he hired any work at all on the boat-house.

Q. Who was the architect that made the plans of the place and the house?

A. Mr. Sutton. I think they employed an architect to revise his plans and make some changes, but that I don't know personally. I only know what Mr. Sutton told me about that.

Q. Was it an Oconomowoc architect; do you know his name?

A. No, I don't.

Q. How much furniture was in that house that you saw in the fall of 1881; in that house on the new place?

A. There was some furniture in the house that was not arranged for living; it was merely put in to be arranged at some other time.

Q. It was stored there?

A. Yes, sir; apparently.

Q. Whom did you see Mr. Sutton employ or discharge?

A. I didn't see him discharge anybody.

Q. Whom did you see him employ?

A. I saw him employ some. I don't know the names of the workmen. He had one man by the name of Washburn working for him.

Q. What was he doing?

A. He was working at the grading. Mr. Washburn seemed to be overseer of the grading.

Q. Did you see Mr. Sutton employ him?

A. I did not. I saw Mr. Sutton consulting with him, or giving directions as an employer to one employed.

74 Q. What contracts did you ever see Mr. Sutton make with any person with reference to that place?

A. I don't think I saw him make any of the contracts.

Q. Where were the boats kept previous to being put upon that place?

A. They were kept over at the cottage where Mrs. Sutton lived, and from there they were moved upon the new place.

Q. Where was Mrs. Sutton's horse and buggy kept before that?

A. They may have kept it in a livery stable. They didn't have any barn on the small place.

Q. Then it was moved from the livery stable to the new place?

A. I don't know. It was brought from somewhere, and I presume it had been kept at a livery stable.

Q. What farming tools did you see on the place?

A. I saw rakes, hoes, shovels, axes, a plow, and various other tools on the place.

Q. How many acres were on this Breck place?

A. 8 acres.

Q. When did Mr. Sutton get those farming implements?

A. I don't know.

Q. Were many of them new?

A. Well, I don't know; I didn't examine them.

Q. How large is the place where Mr. and Mrs. Sutton lived on this lot?

A. Less than half an acre; perhaps one-fifth of an acre or one-quarter of an acre.

Q. Did Mr. Sutton have these farming tools on this farming place previously on the small place?

A. Some of them.

Q. Do you know he had some of them; how many did he have?

A. Well, I had seen axes and rakes and shovels on the Hitchcock place.

75 Q. You don't mean that they had a great many rakes?

A. They didn't keep them like a store, for sale.

Q. Had they one shovel or two shovels?

A. Well, there were shovels and spades—probably 2 or 3 or more, and rakes, a number of them.

Q. Two or three?

A. I presume. I can't tell. I could see men using them; some of them. I don't know how numerous they were, but they had tools there of all kinds that are used on 8-acre plantations.

Q. Or on one-quarter-acre plantations?

A. They used some on their one-quarter-acre plantation. They cultivated part of it as a garden.

Q. Now, Mr. Westover, do you know, as you understood it from their living with you, just about what Mr. Sutton's pecuniary circumstances were?

A. No; I don't. I don't know to-day whether he is worth, or his wife is worth, exclusive of the houses and lots, a thousand dollars or ten thousand dollars. I don't know. I never have been informed in the world.

Q. Then Mr. Kenyon was much more given to conversing with you about his matters than Mr. Sutton was?

A. Yes, sir; always; very much.

Q. And yet he was a reticent conservative gentleman?

A. I think that he knew all the inside of the Sutton family that I never did know.

Q. Did you know when Mr. Kenyon and Mr. and Mrs. Sutton first became acquainted?

A. Only as I have heard them talk about it.

Q. Of course, as you have heard them or Mr. Kenyon speak about it?

A. Mr. Kenyon, as I understand and always understood, was many years ago, when a young man, a friend of the father of Mrs. Sutton. That Mr. Miller and Mr. Kenyon were intimate ever

since Mrs. Sutton was a child, and that Mrs. Sutton has known Mr. Kenyon intimately probably all her life.

76 Q. And Mrs. Sutton's father resided about New York?

A. He resided in New York and Brooklyn.

Q. Well, Mr. Westover, did you know of the conveyance of the Hitchcock lot by Mr. Kenyon to Mrs. Sutton?

A. Yes, sir.

Q. At about the time of it?

A. After the time of it.

Q. How long after the time of it?

A. I don't know. I never knew exactly when it was conveyed.

Q. When did you first know, as far as you can remember?

A. Mr. Kenyon told me of it. I don't recollect when it was made; otherwise I had no knowledge.

Q. Did you also know it from Mrs. Sutton?

A. Not then. No; I didn't learn it from Mrs. Sutton.

Q. Did you at any time know of it from Mrs. Sutton?

A. Yes, sir.

Q. Did you know from Mrs. Sutton or Mr. Kenyon what was the actual consideration of that conveyance to Mrs. Sutton?

(Objected to.)

A. Yes, sir; I did.

Q. What was the actual consideration, as you understood it, as to whether there was any actual consideration or whether it was a gift?

(Objected to as material.)

A. I can't exactly answer the question as you have changed it, for I cannot say whether the consideration was an actual consideration or it still remained a gift, but I can tell why it was done and what was the reason for, and what was the consideration of, if there was any. I understood that that cottage was conveyed to Mrs. Sutton as a remembrance from Mrs. Kenyon. That it was Mrs. Kenyon's tribute to Mrs. Sutton for the services Mrs. Sutton rendered

77 her, and for the obligation that Mrs. Kenyon considered herself under and felt towards Mrs. Sutton for what she did for her in her last sickness. That was what I was told by Mr. Kenyon and by Mrs. Sutton.

Q. The conveyance was made two years or more after Mrs. Kenyon's death?

A. Yes, sir; I think so, because he didn't purchase it for more than two years after Mrs. Kenyon's death.

Q. In other words, as you understood from Mr. Kenyon, it was conveyed by him to her in compliance with the request of his wife that he would remember and do something for her?

A. Well, partly. I understood it was conveyed to her as carrying out, either wholly or in part, the express desire by Mrs. Kenyon, that something should be given as a memento of Mrs. Kenyon's gratitude to Mrs. Sutton; exclusively on that basis.

Mr. JENKINS: That is all.

Mr. HURLBUT: Is there anything else, Mr. Westover, you recollect now about the matter?

A. I desire to explain one or two things. Mr. Jenkins asked me how much Mr. Kenyon paid me a week for board. I answered that he paid $10. I should say that the computation of $10 was attempted to be based upon the actual cost of having him there. It was not paid to me as a recompense for taking him and having the charge and care of him as a boarder; and in the manner in which we lived the $10 was not a cent more and probably a great deal less than the extra expense, for there was no cheap living. It was on the broad gauge, and part of the consideration was that he should look to us for nothing more than simply his bed and board, his bed and food. That Mrs. Sutton would have the full burden and care of him otherwise. He paid Mrs. Sutton, also, $10, after I removed from Oconomowoc, and he lived with her, as I understood,
78 weekly to enable them to meet their cash outlays, at least, because, I suppose, that Mrs. Sutton was not in a condition to advance all the money to pay all the bills to support them, and he did not require it. I understood from him, as he said, that the services of Mrs. Sutton which she had rendered him, and which he was under obligations to requite, together with those of the same kind which she had agreed to perform in the future, were the basis of his promise to convey her the premises in dispute, and were outside of anything which he had furnished in cash expense of living.

Q. So that $10 a week that he paid there was not for any of her services which she rendered to him personally, any special care of him, but simply towards the cost of the family living and other disbursements; and her labors for him, and the other services rendered by Mrs. Sutton were not paid in money but were to be paid in this way—by the conveyance of that land?

A. That is what I understood from Mr. Kenyon and all the parties. I testified in the direct that Mr. Sutton was there making contracts, and so on, as a supervisor, and personally in posssession of the premises. Mr. Jenkins asked me, I don't know why, if I ever saw him make contracts with anybody. I answered I never did see him make a contract. How I did know that he made contracts was because I heard a conversation about what was being done about the place, and Mr. Sutton told me what Mr. Kenyon did, and they both explained to me what was going on about the place, and I knew from their acts and conversation that Mr. Sutton was making the contracts that were made in hiring people to make improvements on the place. The further knowledge that I have about contracts made afterwards, in the construction of the
79 house, the new house, and information I had of the contracts, I didn't get from Mr. Kenyon.

Mr. JENKINS: Q. Mr. Westover, were you stating in relation to what you understood to be the consideration for deeding the cottage, you understood that from Mr. Kenyon or from Mrs. Sutton?

A. I understood so from both of them; that is my recollection.

GEORGE F. WESTOVER.

ELIZABETH Q. WESTOVER, being first duly sworn, testified as follows:

Direct examination by Mr. HURLBUT:

Q. Mrs. Westover, where do you reside?
A. Chicago, Illinois.
Q. How long have you resided here?
A. Since 1874.
Q. You may state about your age?
A. 33.
Q. Are you acquainted with the parties to this suit?
A. Yes, sir.
Q. About how long have you been acquainted with the complainant, Mrs. Sutton, and John S. Kenyon?
A. All my life, sir; the two of them all my life.
Q. You may state what you know, if anything, in relation to John S. Kenyon's residing with the complainant?
A. Well, I can tell you a few things in a few words. I know that he did reside with Mrs. Sutton, and I always looked upon him as one of the family, as I would look upon my own father.
Q. And the complainant is your sister?
A. Yes, sir.
Q. The witness, Mr. Westover, who has just been sworn, is your husband?
A. Yes, sir.
Q. Mrs. Westover, state what you know about the relations between Mr. Kenyon and Mrs. Sutton?

Mr. JENKINS: It is not necessary to go into that; there will be no dispute about all that.

80 Mr. HURLBUT: Very well, then, let it be noted that the relations between Mr. Kenyon and the complainant, and the services performed for him by complainant, are admitted to be as testified to by Mr. Westover.

Mr. JENKINS: About their living together and all that, we don't dispute. Go right on with your questions about this place, if you have any.

Mr. HURLBUT: Very well. Now, I would ask you if you ever heard Mr. John S. Kenyon make any statements in relation to the property here in dispute? If so, you may state what those were, if they were in relation to the complainant's having anything to do with it.

A. Well, a year ago last August, in 1881, I went out to the Oaks; I was at my brother's and took a drive to the Oaks.
Q. You may explain what you mean by the Oaks?
A. Well, I mean the place in dispute; that was called the Oaks.
Q. Well, now, you took a drive?
A. Yes; over with my sister, Mrs. Sutton, and Uncle John, and my little daughter; and when we drove around the place Uncle John laughed, and said that he had sold some clover at some previous time—whenever they sold clover—and that Sortie had $20, the

first money she had made—that she had made—Sortie; I mean the complainant, Mr. Sutton. Well, now, I know very little more. When they stopped at our house in the fall—when they went east, the winter or fall of 1881—when they went east Uncle John said they would be back soon, because that when they came back, he said, "we have to get Sortie's place all ready, so that she can take summer boarders, and get it all fixed." That was the last time he went to New York. I would say that at the time I went to look around the place—the "Oaks"—among other things about
81 the house, I saw some dining-room furniture in the house, and I didn't know before that anybody had moved anything there yet.

Q. You saw some dining-room furniture and other furniture?

Mr. JENKINS: I suppose some of the workmen had been taking their meals there.

A. The furniture belonged to Mrs. Sutton. I had seen it in the old house where they lived. That was the last of August or the first of September, 1881.

Q. What else did you notice there at that time?

A. I don't know of anything else.

Q. Was that all the conversation that you remember of having upon the matter?

A. Except that Uncle John told me that he had given the place to Sortie to spend summers there.

Q. When was that?

A. That was that same time. That was the time when they went through to New York; that was either winter or fall. Well, and Uncle John told me that his wife had cancer in the stomach, and that her sickness was such that he could get no one to take care of her, and that Sortie had been like a daughter to her, or like a sister, and had taken full charge of her through her sickness, and that she had charged him to make some provision for Sortie; his wife had charged him.

Q. Mrs. Westover, I ask you to state as to the fact whether you asked Mr. Kenyon at that time, or at any other time, at your house in 1881, how his house was getting along at Oconomowoc; and, if so, what was the reply?

A. I said, "Uncle John, you need a new hat." "Well," he said, "we are building the place for Sortie; after that is finished, and Sortie is nicely fixed, I will get some new clothes."

ELIZABETH Q. WESTOVER.

82 *Testimony under Stipulation on Reference under Rule 67, in Equity, at Oconomowoc, April 12th, 1883, at 9 a. m., before Francis Bloodgood, Examiner in Chancery.*

(Title of the cause.)

DAVID W. SMALL, called by plaintiff, being duly affirmed, testified:

Q. State about your age.

A. 53 in December next.

Q. How long have you resided here?

A. Since 1851. I was here in 1850, but did not take up a home here and settle down to live until 1851.

Q. Are you acquainted with the parties to this suit?

A. I am acquainted with Mrs. Sutton, but not with the defendants.

Q. Were you acquainted with John S. Kenyon in his lifetime?

A. I was.

Q. How long were you acquainted with him, and at what place?

A. Quite a number of years; since he first came to live at Oconomowoc; I cannot tell how long; I should think some six or seven years; it may be longer; I cannot tell.

Q. Were you on rather intimate terms with him?

A. We were quite friendly.

Q. Were you acquainted with the place called The Oaks, in the second ward in the city of Oconomowoc?

A. I do not know any place by that name. I had not heard it had been christened.

Q. The place formerly owned by Samuel Breck?

A. I know that place and its location very well.

Q. About how far from your residence is that?

A. It is about ninety rods, I think, from my residence. It adjoins my property on the west.

83 Q. On the bank of what lake, if any?

A. Lake La Belle.

Q. Situated on the south side of Lake La Belle?

A. Yes, sir; right west of my residence, on the south side of Lake La Belle.

Q. You may describe the place as it is, if you please. Give a general description.

A. There are ten acres of rolling land on the lake shore; it is high, dry ground, and along on the east side of it, and on the west is some low, wet land. There are two buildings on it one a large house, modern built, in an unfinished condition, and a small house lying a little southwest of it, finished, and a barn on the southeast of the large house, finished.

Q. You may state what you know of the ownership of it of your own knowledge.

(Objected to by defendants' counsel as irrelevant, incompetent, and immaterial.)

A. All I know about it is what Mr. Kenyon told me about it; that is all I know in relation to it.

Q. State, if you please, if you had a conversation with Mr. Kenyon, the deceased, in relation to the property; and if so, what that conversation was.

(Objected to.)

A. The first conversation I had with Mr. Kenyon was in the spring before any building was put up there. That was in the

spring; the building was put up year before last, I think. When did Mr. Kenyon die?

Mr. HURLBUT: A year ago, January, 1882.

A. It was in the spring of 1881; the spring before he died. I think it was a few weeks after he returned from New York; he came to me and asked me what architect I would recommend him to; that he was going to build a house on the Breck place. I said
84 to him that there were several good architects in Milwaukee. I wanted to know what sort of a house he was going to build, and why he was going to build on there. He said he was going to build a pretty good house, and have it when completed so it would be comfortable, and that he would have it done this spring if he could get an architect. I recommended him to Koch. That was all that was said then. Some weeks after that he told me he had got the plans from Koch, and was going right on to have the building put up. The building was then commenced, and I think the foundations were laid. and perhaps more done to it. Then some time in the summer Mr. Kenyon went back to New York; was gone awhile, and I hadn't any conversation with him until just after he returned. I was over there in my hop field, and I think it was, if I am not mistaken, just after the hop-picking time; I am not sure as to the date, along in September or October; Mr. Kenyon was down in the barn, and I got over the fence and walked down with him; we walked down by the lake; it was a warm, pleasant day; we sat down and began to talk about it. I said: "You have a mighty big house here; what use have you for such a house?" He said: "I am not building it for myself; I am building it for Mrs. Sutton." And I said to him: "That will be all right; you are not going to leave us?" "No," he said, "I shall stay here; the climate agrees with me here better, and so it does with Mr. and Mrs. Sutton." And then he said he didn't want to be bothered with the building of it; he had left it all to Mr. and Mrs. Sutton; he had nothing to do with the building, except to furnish the money; they had modified the plans from the original, so the cost was less, but according to their own ideas, and the rooms, and adaptation of the rooms had been all arranged by Mrs. Sutton, and he intended she should have it as she wanted it. I then
85 asked Mr. Kenyon in whom the title was, whether it was in Mrs. Sutton at that time. "No," he says, "when the property was bought I took the deed, but," he says, "I intend to have the property all fixed in Mrs. Sutton." I said, "Haven't you done anything about it yet?" He said "No." Said I, "You may have it in your mind to do something you want to do, but if you do not do it, if you should be taken away, it won't be done. Under our law, unless there is a writing made, or the parties put in possession under the agreement, it won't amount to anything." He said, "I can't make out anything here for the reason my papers are in New York. I desire to make some alterations in my affairs. Then I shall fix it up, but I shall put them in possession. I have put them in possession. Mrs. Sutton has had possession ever since I went to New York

in the summer. I turned it over to them then, and they are now in possession. Mr. Sutton has the keys to the little house and all the property, and I intend they shall be in possession, and are in possession, just as perfect as I can make it. If I had my papers here I should have them altered now. I have my attorney down there. I don't want to do anything until I get down there." He said, "I propose to give it to them. Mrs. Sutton has been very kind to me in sickness and disease in my family; took care of my wife until she died. I have a good home myself with them. I propose now to repay them in this way." Then I think that ended it. Mr. Sutton was there all summer looking after the building. I had seen him frequently overseeing the workmen. Then, I think, about two weeks before he went away I met Mr. Kenyon again, before he went to New York. I know it was a short time previous to his departure to New York for the winter, and I said to him, "Do you remember the talk we had?" "Yes," he says, "that is all right;
86 they have put their furniture over there. They have possession of it, and they are now in possession of it. I am going down to New York. As soon as I get down there and get rested I will fix it all right." He said another thing he wanted to get was the Norwegian Johnson's lot. He said he was negotiating for it; would like to get it before the papers were all made out. I was over there, I think, two weeks before they left. I found the little house had been finished and completed, and that the new house was up and roofed, and some back plastering done in it, and whether there were any windows in it or not I don't remember. They were boarded up, at least, and down below I think there were some temporary windows put in; I am not sure. The main house was all locked up; doors were all locked.

Q. State as to the boat-house.

A. There was a boat-house built there.

A. You may state where that Johnson lot was he referred to, if you know.

A. Between the lake and the road, on the road; on the south end of the property that belonged to Breck.

Q. What was called then the Breck lot?

A. Yes, sir; part of that originally. There is a narrow strip running from the road back to the lake, and this Johnson lot was a piece on the south end of it, leaving a roadway to drive in on one side; about two acres, I should think.

Q. Was there any other conversation that you had with him that you think of in relation to it?

A. I cannot recollect any special conversation. We had several conversations in relation to the division line between us. The other main conversation I had with him was in reference to the property, and I told him what the law was in this State in relation to those matters.

Q. Did he ask you or did you volunteer that?

87 A. No; he was talking about it, and I think I asked him, as I have already stated, whether he had made any provisions in relation to it, and he said he had not, but would as soon as he

got down to New York, as I have stated. I told him if anything should happen between times his intentions would not amount to anything, unless something further was done. As I stated, he said he had put them in possession as far as possession could be given.

Q. That was the last conversation you had?

A. No, sir; the first. In the last conversation he said that they had moved their goods into one of the buildings; Mr. Sutton had the keys, and the possession was theirs; the property was theirs, to all intents and purposes; as soon as he got to New York and got rested he should have the papers made. He said, "They will finish the building; I will furnish the money, and they may finish it just as they want to." Sometimes he spoke of Mr. and Mrs. Sutton, and frequently he spoke of them as "the children." We all knew who he meant.

Q. He called them the children?

A. Yes, sir.

Q. Where, if you know, did he live during the time he was here?

A. Always with Mr. and Mrs. Sutton. He told me in the conversation he had always made his home with them since his wife died

Cross-examined by Mr. JENKINS:

Q. Judge Small, how large a house was that which was built upon the Breck property, and to what uses was it apparently to be devoted, from the style and manner it was built—the new house?

A. It is mere guesswork as to the dimensions; I never measured it. I should think it was a house on an average length of probably 50 to 60 feet, and a width of probably somewhere between 30
88 and 40 feet—not exactly a parallelogram, but the house varying in little projections.

Q. What you would call a large house?

A. Yes, sir; I should call it a large house.

Q. Of about how many rooms?

A. I cannot tell, but I should think there was in all 12 to 14 rooms, just from memory. I never counted them, but I should judge so.

Q. Did Mr. Kenyon, in any of these conversations, say anything in regard to the design of keeping boarders in that house?

A. Yes, sir.

Q. What did he say in that regard?

A. He said Oconomowoc was quite a summer resort, and he said he thought a house as large as that was would enable Mrs. Sutton to take some summer boarders and get an income that way. He said it might be used for that if they desired to use it so.

Q. He expected to live there, did he?

A. He expected to live with them.

Q. What sort of a man was Mr. Kenyon—as to whether he was free and easy and talkative about his own affairs or reticent?

A. Well, sir, I think he was very free, so far as talking about his affairs with Mr. and Mrs. Sutton.

Q. Generally how was he?

A. He expressed himself on various subjects and topics. I do not think I ever heard him say anything about his own affairs, except

in that one statement—he said he wished to make some changes in the disposition of his property, and would do so when he got to New York. That is the only time he ever referred to his private affairs disconnected with Mr. and Mrs. Sutton, that I know of.

Q. If I understand you, you had three conversations with Mr. Kenyon in regard to this matter?

A. Yes, sir.

89 Q. As to the second conversation when you went down to the lake together, will you be kind enough to repeat just what was said, and, as nearly as possible, repeat it in the order in which it was said, and give the language, as nearly as you can, that he used and that you used?

A. I think I can. I was out there; I got over the fence, and I says—I think it was in the afternoon—"Good afternoon, Mr. Kenyon; how do you do?" Then I said—I think the next thing was this: "It is a mighty pleasant afternoon; not any too warm and just comfortable." He said, yes, it was a very pleasant day. We walked on then down to the lake under the shade of the trees. We sat down. I think that the first thing he said was that he was well satisfied with the division that we had arrived at in relation to the line; it gave him a very pleasant boat-landing there, and he seemed to be very well satisfied with it. I then said, "The house is pretty large, Mr. Kenyon." "Yes," he says, "I am building it just for the purposes for Mrs. Sutton to use if she wants to keep boarders. And then I said that could be done very well, because Oconomowoc was quite a watering place, and that was a pleasant place on the lake; undoubtedly she could do well. He said he intended she should turn it into a boarding-house, and he wanted it large enough, so she could use it for that purpose. Then I asked him if he was going to stay there; he said he should, probably, most of the time. I then asked him the question directly as to whom the title of the property was in there. I did not know; I never had heard anything about it, and I supposed from what I had talked——

Mr. JENKINS: No matter.

WITNESS: I asked him that question. He said the title was taken in his name when he bought the property, but that he intended that Mrs. Sutton should have it. I asked if there was any

90 arrangement made—any writing. He said no. I told him under our law any intention of that kind would not be valid; there must either be a writing or provision in the will, or must be actual possession given under the arrangement in relation to the purchase or transfer of the property. "Well," he says, "the possession has been in Mr. and Mrs. Sutton ever since I went East in the summer; I turned the possession over to them then, and they are now in full possession of it, just as much as though they had the title." I told him that would have to be done, because they could not hold it, unless there was some change made in it, and he ought to do it now; he could not tell what might happen. He says, "Everything is down in New York; I can't do anything now until I go down there." That is all that was said about it there. Then there was

some other desultory conversation; I don't think anything more in reference to the property at that time.

Q. Have you, in answer to this last question of mine, stated the whole of that second conversation, so far as it has reference to this place?

A. I think mostly.

Q. Was there anything said in that conversation in respect to the Johnson lot; that was at the second conversation?

A. No, sir; that was the last conversation I ever had with him.

Q. In that conversation did he speak of Mr. and Mrs. Sutton as the children?

A. I am not sure that he did in that conversation.

Q. In that conversation did he say anything in regard to making different arrangements about his property when he should get to New York?

A. Yes, sir.

Q. What did he say on that subject?

A. He said this when I spoke about what the law required in this State, and suggested that if he intended to do anything he
91 had better do it, as some contingency might happen to him; he said his paper was down in New York, and his lawyer; he didn't want to do anything until he got down there; he desired to make some changes.

Q. Changes in what?

A. In the disposition of his property.

Q. That is in reference to his will?

A. I inferred that; he did not mention his will at all.

Q. In what conversation was it he spoke about Mrs. Sutton having been kind to him and his wife; was it in that second conversation?

A. Yes, sir.

Q. State just what he said about that.

A. In speaking about it he said that he wanted to give that property to them; that Mrs. Sutton had been very kind to them; had attended him in sickness and in the sickness of his family, and had done everything, and made it as comfortable for them as they could; he thought this was a fair return to make, to give them this property.

Q. Did he use the words in that conversation "his wife;" that Mrs. Sutton had been kind to his wife?

A. Yes, sir; I think he did.

Q. Had you ever had any conversation with Mr. Kenyon in respect to the lot in the city of Oconomowoc, where Mr. and Mrs. Sutton lived?

A. No, sir.

Q. When was this last conversation had with Mr. Kenyon?

A. I think about two or three weeks prior to his going back to New York in the winter. I don't recollect now, but it was a short time before. I know there had been some talk about his going east, and it was just before he started.

Q. Tell me that conversation as nearly as you can remember; the

language which he used, as well as that which you used, and the order of it.

A. I met him, I think it was, near where my sidewalk comes out into the road; he was walking down the street; we
92 stopped and talked. I said, "I hear you are going back to New York for the winter." He said, yes, they should go pretty soon. I said, "How is everything getting along over on the new purchase, the new buildings?" He said everything was all right; that Mrs. Sutton had taken over some furniture and put in; that he had requested her to put the furniture in there; that the keys were in the possession of Mr. and Mrs. Sutton, and everthing would be locked up, and possession would be theirs, and he again spoke about when he got down to New York. I asked him whether anything further had been done. He said no; when he got down to New York and got rested he should have things changed; he had his lawyer there, and all his papers. There was another thing he wanted to do, to get the Johnson lot and have that go with it; there were some negotiations for it; he hadn't been able to get it.

Q. He wanted to get the Johnson lot before he should transfer the title to the whole?

A. That is what I understood.

Q. Did not Mr. and Mrs. Sutton accompany him to New York at that time?

A. They did.

Q. What did he mean, or what did you understand him to mean; they had the keys; he left them in possession?

A. I only inferred from our conversation it was necessary to put them in possession under that arrangement.

Q. Are you confident that he said that Mr. and Mrs. Sutton had the keys?

A. Yes, sir; he told me that directly; they had full possession.

Q. As to the keys?

A. As to the keys, too; said the house was theirs; he turned the keys over to them, and that Mrs. Sutton had put some furniture into the little house under his direction.

93 Q. Are you confident he said in that conversation, that last conversation, that Mr. and Mrs. Sutton had the keys?

A. Yes, sir; because we talked about it directly.

Q. In that conversation did he speak of them as the children?

A. I think that was the conversation.

Q. State just how he used that expression—in what connection.

A. He says—I asked the question whether they were going back right away; Mr. Sutton's health had been much better here than there. He said, Yes, he guessed he would take the children with; if they kept well they would stay there all winter; if not, they would come back earlier.

Q. Do you think he told you in that conversation, if he did, that they had planned the house, or had altered the plan?

A. That was in the second conversation—the one at the lake.

Q. Be kind enough to repeat it?

A. He said the original plans had been changed by Mrs. Sutton;

he had left the whole matter to her; to be built and constructed just as she wanted it; she had made some change from the original plans in the arrangements of the rooms.

Q. Did you understand Koch had drawn those plans?

A. I know he had; I had seen them. I think Mr. Kenyon went into town with me when he went in to submit the plans to Koch. He had before been in and seen Koch, and then had made, or had with him, some plans—I don't know who made them; sort of rough sketches—and was going in to make the final arrangements with him to make the plans.

Q. Do you know who was the carpenter employed in building that house?

A. I don't know whether there was any carpenter by contract. I got the impression, it is only an impression, the work was done by day's work.

94 Q. You don't who the carpenter was?

A. No, sir.

Q. Do you know who the mason was?

A. I know them, but I don't know as I can name them. There were some Norwegians at work on it.

Q. Did you see Mr. Kenyon around there while the work was going up?

A. Yes, sir; he was there sometimes.

Q. What was he doing?

A. Not much of anything.

Q. What was he doing?

A. I don't think he was doing anything at all.

Q. How often did you see him there?

A. I used to go out every time I went to that side of the farm; when I went to look after my own matters I generally came around that way; sometimes I saw him, sometimes not; I can't tell how often.

Q. How often did you see Mr. Sutton there?

A. I don't think I was ever over there but what Mr. Sutton was there.

Q. How often did you see him?

A. I can't remember how often I was there. I know I was often there in the summer; it being a new building I had a curiosity to see how it was progressing. It is utterly impossible for me to tell how many times I was there during the summer. I should think a dozen or fifteen times during the summer.

Q. Was the building near completion at the time that Mr. Kenyon went to New York? I mean the new building.

A. The last time? Yes, I think it was all roofed; the back plastering in; I think some of the partitions set; the water pipes and gas pipes were in; I don't know how much, but a good deal of that piping put in. As I say, there were some temporary win-

95 dows put in below, and I think above they were boarded up, but the house was all covered in.

Q. Was the little house, into which you say Mr. and Mrs. Sutton

had moved some furniture, ever occupied by them for living purposes, to live in?

A. Not up to that time.

Q. When was it first occupied by them to live in?

A. I think when they came back the next spring.

Q. After Mr. Kenyon's death?

A. Yes, sir.

Q. And the large building has never been occupied, has it?

A. No, sir.

Q. And has never been completed?

A. No, sir.

Q. No work has been done upon it since Mr. Kenyon's death?

A. No, sir; not that I know of.

JACOB WELTNER, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. In Oconomowoc, Wisconsin.

Q. How long have you resided here?

A. I think 21 years now.

Q. What is your business?

A. Contractor—builder—since the first year of the war, 1861.

Q. You have been engaged in that business here since then?

A. Yes, sir.

Q. I will ask you to state if you are acquainted with the parties to this suit. Are you acquainted with the plaintiff, Sarah S. Sutton?

A. Yes, sir.

Q. Are you acquainted with her husband, Charles Sutton?

A. Yes, sir.

Q. How long have you been acquainted with them?

A. It must be ten years; ever since they have been here I have been acquainted with them; I didn't really keep the number of the years. I have been acquainted with them since they have lived here.

96 Q. Were you acquainted with John S. Kenyon in his lifetime?

A. Yes, sir.

Q. How long were you acquainted with him?

A. I was acquainted with him ever since he first bought the old Hitchcock place there, when he first moved there, when he first came here.

Q. I will ask you to state if you are acquainted with the property known as the Breck place, adjoining Judge Small's place on the west, and on the south side of La Belle lake.

A. Yes, sir.

Q. How long have you known that property?

A. Since a good many years ago, when Breck used to own it. I done work for Breck when he owned the place.

Q. You worked on that property when Breck owned it?

A. Yes, sir.

Q. To whom was that property transferred; who bought it of Breck, if you know?

(Objected to.)

A. I could not tell.

Q. I will ask you to state if you know what that property is called now. Is it called by any particular name?

A. I don't really know; I know I built a house there. I took charge of the men. I took the plans and built the house.

Q. When was that?

A. Year before last, I think.

Q. A year ago last summer?

A. Yes, sir; last fall we commenced; that is, I worked there early in the spring, when we removed the old house. I done some work. That stood on the ground where the new one stands. I done some work in the old house.

Q. And you built the new house?

A. Yes, sir.

Q. Had charge of the men?

A. Yes, sir.

Q. You may describe that new house, if you please; the whole property there.

97 A. The new house stands about, I would say, probably 75 feet awayf rom the old one.

Q. How near the bank of the lake?

A. It must be within 100 feet, 75, 125 feet; I ain't measured closely; anywhere from there to 150 feet.

Q. State whether there is a boat-house there?

A. Yes, sir.

Q. Who constructed the boat-house?

A. The boat-house was built before I built the new house.

Q. Who had the general supervision, outside of yourself?

A. Charles Sutton hired me; I made the contract with him.

Q. Charles Sutton, the husband of the plaintiff in this suit?

A. Yes, sir.

Q. You made the contract with him?

A. Yes, sir.

Q. Was the contract in writing?

A. I believe so. I was over there one day; I went there one day and came a little too late. I had agreed to meet Mr. Sutton at a certain hour in the morning to stake out the grounds; I had to unload a car of lumber, and I didn't get there at that hour. I went over there with a laboring man with my horse and wagon, and when I got there Mr. Sutton was gone. I saw Mr. Kenyon on the road; he was grading the road; I said, "I am sorry I was late; I had so much to do; I want to do that work." Says he, "I have nothing to say; you must see Mr. Sutton." That was Mr. Kenyon; he was on the road grading with a team—the road from Milwaukee street back to the house. So I then came over town and went right to the house where Mr. Sutton lived, and I talked with him there; I told him——

(Objected to.)

Q. What did you say with him, Sutton?

(Objected to as improper and irrelevant.)

98 Q. I understood you to say that you saw Mr. Kenyon grading on the road?

A. Yes, sir; when I went to the house and found Mr. Sutton had gone.

Q. Then you saw Mr. Kenyon?

A. Yes, sir.

Q. Repeat what you said to Mr. Kenyon and Mr. Kenyon said to you?

A. I said to Mr. Kenyon that I had agreed to meet Mr. Sutton at a certain hour; I had been so busy I could not get there at that hour. I was pretty near an hour late. I said Mr. Sutton is gone. Says I, "I don't want to lose that job, Mr. Kenyon; I want to build that house." He says, "You go and see Mr. Sutton; I have nothing to do with it." So I left him on the road and drove over to Mr. Sutton's house—where he lived.

Q. Then you went to Mr. Sutton's?

A. Yes, sir.

Q. Go on and state if you had a conversation in relation to building that house with Mr. Sutton.

A. Yes, sir. He had just come in with a boat. I sat on the platform; Mr. Sutton sat in the boat. I had with me——

(Objected to.)

Q. Now, state what that conversation was with Mr. Sutton in relation to building that house.

(Objected to as irrelevant, immaterial, and improper.)

A. Says I, "I agreed to meet you at such an hour—I think it was half past 9 o'clock—but I was so busy I could not get there in time." He says, "If you can't build my house and attend to it I will get somebody else;" that is just the words he told me. He was sitting in the boat; I was on the platform; I was sitting right by him; I think there was a chair on the platform that I sat in; I am not sure. Says I, "I want to build that house for you," and he says, "If you bind yourself by contract, bind yourself to do that work, and be there yourself, I will give you the job;" that is just
99 the words he told me, I think, right there. Says he, "All right, we will make a contract," so I went and we made a contract; I bound myself to be right there——

(Objected to.)

Q. Was that contract in writing?

A. I believe so. I think we went over to Mrs. Williams', and I think she drew a contract between Mr. Sutton and I.

Q. In pursuance of that contract did you go on and construct the house?

A. Yes, sir.

Q. Who had the general supervision of the property there? Go on and state what you know about it.

A. Mr. Sutton hired me, paid myself and the men; I had some of my own men, and he hired some, and Mr. Sutton paid us every Saturday.

Q. Who furnished the lumber?

A. I think——

(Objected to.)

Q. Who did you go to for lumber?

A. We went to the lumber yard; Ackley & Vilas furnished the lumber.

Q. How long were you working there?

A. I have not my time book with me. We worked there until some time in December. I had everything done ready for lathing, finished the whole outside except the veranda, and got it all inside ready for plastering. The stairs were built, except the front hall stairs; the side stairs was built. I think they are built.

Q. State who, if you know, had the general charge outside, the general care of the improvements.

A. Mr. Sutton. Mr Kenyon was there nearly every day, but he was in the garden gathering up corn, tomatoes; he was there nearly every day, but was out around in the garden. He had nothing to say; I don't believe he asked a dozen questions while we were building the house.

Q. Who did it all?

A. Mr. Sutton; he used to superintend the boys generally.
100 When he wanted anything he told me, and when I wanted anything I asked him and he ordered it just as he wanted it.

Q. State, if you know, who had the keys of the building.

A. Mr. Sutton. He had the keys—we hadn't any keys to the house, but he had the keys of the barn, where we kept the tools, and the workshop; down below I kept my horse, and Mr. Sutton had the keys of the barn. There were no keys to the house; just closed the windows and doors with boards to keep the storms out.

Q. Do you know who had the keys of the other building?

A. Mr. Sutton.

Q. You may state what property Mr. Sutton had there, and what use he made of that building, if any, if you know, the old building?

A. There was not anything inside that I know of; it was not occupied then.

Q. He had the keys, and it was locked?

A. Yes, sir.

Q. State as to whether Mr. Sutton's horse and carriage were there.

A. Yes, sir; Mr. and Mrs. Sutton came around there two or three times a week when it was pleasant. Mrs. Sutton came for Mr. Sutton and Mr. Kenyon; when it was too rough on the lake she came with a horse and buggy and took them home.

Q. Where was Mr. Kenyon living at that time?

A. With Mr. Sutton in the house here on Main street.

Q. Who paid the money?

A. Mr. Sutton.

Q. To the workmen and to you?

A. Mr. Sutton paid the bills. He paid all bills, everything, and bought the brick we used there and paid for them, and the stone, lime, sand, all that was bought there; anybody that came with a bill—Mr. Sutton always paid the bills; I never saw Mr. Kenyon pay a dollar. All that I know Mr. Kenyon paid for was for a ham-
101 mer that somebody stole from me, and Mr. Kenyon bought me a hammer and made me a present of a hammer just like it. I felt so bad about the hammer he bought one and gave it to me in the place of the one that was stolen from me. That is all the money Mr. Kenyon ever paid.

Q. Did you finish your contract?

A. Yes, sir. It was all day's work.

Q. Who accepted that from you?

A. Mr. Sutton.

(Objected to as a legal conclusion.)

Q. What was done in relation to it when you got through?

A. Mr. Sutton felt very much pleased; he said, "This is all we can do now; we will get it lathed this winter; next spring we will finish it."

Q. And he settled up and paid you off?

A. Yes, sir.

Cross-examined:

Q. Where is that written contract you made?

A. I think it was left at Mrs. Williams'; she is an attorney or notary public. I signed it and left it with her—that is, I didn't see it any more, and I don't know whether Mr. Sutton took it or Mrs. Williams.

Q. You did not have a copy?

A. No, sir.

Q. What was the condition of Mr. Kenyon's health at that time?

A. He was in very good health.

Q. When did you commence working on that house; take first the little house?

A. In the fore part of the summer.

Q. What time?

A. I could not tell, unless I get my time book.

Q. About what time in the summer?

A. I think it must have been in July. June or July; I could not tell.

Q. Did you help move the little house?

A. No, sir.

102 Q. That was an old house, was it not?

A. Yes, sir.

Q. A little old house?

A. It was not very small; quite a good-sized house.

Q. What did you do to it?

A. I went in and put in floors, and built in chimneys, put in a stairway—cut out for a chimney, I think. I had a man working there three or four days.

Q. Any one else working on it?

A. Not at the time I was there—somebody went to work there after I got through.

Q. Doing what?

A. Repairing the old house.

Q. What kind of repairing?

A. I didn't see.

Q. Carpenter or mason work?

A. Both.

Q. Who else was it?

A. I could not tell; I was not there. When I got through some other parties worked there.

Q. How do you know that Mr. Sutton had the keys of that small house?

A. Because I see him open the door when I built the new house.

Q. When?

A. In the fall, during the time I was building the new house.

Q. Did you go in there with him?

A. I think I did once or twice. I went in there several times when he was not there. Part of the time he left the key with one of his men, the man that had charge of the place.

Q. How many times were you in the house?

A. I could not tell.

Q. After you got through working there, how many times were you in the house; working on the old house?

A. In the old house during the time I was at work on the new house, probably a dozen times, but there was not any work done on it at the time.

Q. What was your object in going in it?

A. When it was cold I went in because it was cold; we went
103 in, when we ate our dinners, and when we sat down to smoke.

Q. When were you there last, how late in the season?

A. In the old house?

Q. Yes, sir.

A. It must have been probably a week or two before we got through; may be the same week; I could not tell.

Q. You got through in December?

A. I think so; I could not tell to a day; if I could get my time book I could tell to a day when I got through.

(Witness goes to his house to consult his time book.)

Q. Have you your time book?

A. It was the 18th of November when I got through; I did not bring my time book; I know Mr. Sutton was in a hurry to go East; I got through a few days before they went East.

Q. What did you see in that old building when you went in?

A. We generally went into the basement; they had some furniture up stairs; we went in the basement; we had a stove there and warmed our coffee.

Q. What furniture was there up stairs?

A. I don't know.
Q. You never were up there?
A. No, sir; after the furniture went in we didn't go in there.
Q. Was furniture stored there?
A. I don't know; it was in the house.
Q. Was anybody living there?
A. No, sir; not to my knowledge; Mr. Sutton had a man in charge; he stopped there after we left.
Q. He did not stay there nights?
A. I don't know; he was there mornings before we came, and was there after we left to see that things were in good shape.
Q. Can you tell me about when it was you commenced on this large house?
A. In September.
Q. How many men were working there?
104 A. We started with two at first, two carpenters, three, four, or five laborers, and five or six masons; Mr. Sutton hired a man by the day for the mason work, one from Concord, one from above Mapleton—he had three there, I think; I know them; the season was so busy we had to hire such men as we could get.
Q. What are the names of the men?
A. August Grim.
Q. Where does he live?
A. He lives in Concord, Jefferson county.
Q. The other.
A. The other is a man, an Irishman, that lives by Monterey, the man that had a bottle of whiskey with him; we discharged him once or twice; he is a good stone mason; I forget his name; Mr. Sutton discharged him for unsatisfactory work.
Q. Give me the third man's name.
A. I cannot; we had three there; sometimes we had another one a few days, and he didn't suit, and Mr. Sutton told him to pack up his tools and leave.
Q. At what place did you get your pay on Saturdays?
A. Right at the building.
Q. Were you paid in currency?
A. Yes, sir.
Q. And you say that Mr. Sutton gave you the money?
A. Yes, sir.
Q. Always?
A. Yes, sir; Mr. Sutton kept the time and paid the money every Saturday night before we left the premises.
Q. Do you know where he got it?
A. No, sir; I could not tell you.
Q. That first day you went there to mark off the house you say you met Mr. Kenyon in the road; what was he doing?
A. Grading the roads.
Q. Was it the public road?
A. No, sir; the private road from Milwaukee street to the house.

105 Q. What was it that Mr. Kenyon was doing in the garden when you saw him there?

A. He was there off and on most every day; he had some corn and potatoes there, and tomatoes, and he came with the boat on a nice day, and went to work in the garden; would not come to the house——

Q. I ask you what he did in the garden?

A. He had a hoe, digging up the vegetables, saving the potatoes.

Q. What was kept in the barn?

A. We had two benches in the barn.

Q. What was kept in the way of horses?

A. There was no horses kept there permanently; I kept mine there during the day; Mrs. Sutton came there with a horse sometimes, and sometimes put it in there.

Q. There was nothing kept there permanently?

A. There was a hay loft that was full, and some little corn, perhaps four, five or six bushels of corn.

Q. Hay raised on that place that year?

A. Yes, sir; I found it there when I came there; there was kindling wood there.

Q. With reference to horses and buggies being kept there—there was nothing of that kind, except persons coming there temporarily would put their horses in?

A. There were no buggies inside of the barn that I know after I got there.

Q. Any horses kept there regularly?

A. There were four stalls there, but no horses regularly until Mrs. Sutton or Mr. Sutton came and put a horse in.

Q. When was that?

A. When I was building the house.

Q. What do you mean by putting a horse in?

A. Not to leave them outside so long.

Q. Then it was in there temporarily?

A. Yes, sir.

Q. Just kept there until she went away again the same day?

106 A. I believe so; I think once or twice it was stormy and they could not go home with the horse, and I think it was kept there.

Q. For how long a time; until the storm was over?

A. I suppose so; I saw the horse in there several times, but I was so busy that I did not pay much attention to it.

Q. Who was that man you said was there in the morning when you came there, and staid until after you went away at night, and had the keys; what was his name?

A. Hogey, I think his name was.

Q. Do you remember his first name?

A. I don't know whether it was John—his name was Hogey anyhow; he was a laboring man who worked there.

Q. Where does he live?

A. He did live near the railroad somewhere here in Oconomowoc at that time.

Mrs. LOUISE C. WILLIAMS, called by plaintiff, being sworn, testified:

Q. Where do you reside?
A. City of Oconomowoc.
Q. How long have you resided here?
A. Since 1866, 16 years.
Q. Are you acquainted with the parties to this suit?
A. I am acquainted with the plaintiff; I do not know that I know the other parties at all.
Q. Were you acquainted with John S. Kenyon in his lifetime?
A. Yes, sir.
Q. Are you acquainted with Mr. Sutton, the husband of the plaintiff?
A. Yes, sir.
Q. How long have you been acquainted with him, and with the plaintiff?
A. I should say about ten years.
107 Q. What business are you, and have you been for some time, engaged in in this city?
A. As a notary public, real estate agent, and an insurance agent.
Q. You keep an office here, do you, to prosecute that kind of business?
A. I do.
Q. How long have you been engaged in that business?
A. For myself alone since 1877.
Q. I will ask you to state if you are acquainted with the premises in dispute in this action.
A. I am.
Q. Do you know by what special name that property is called, if any?
A. It has been called by us, in conversation with Mr. Sutton's people, "The Oaks."
Q. Among those people it is called The Oaks, and goes by that name, does it not?
A. Yes, sir; in conversation with those they are familiar with we use the term, "The Oaks," in speaking of the place.
Q. I would ask you to state what you know, if anything, about the erection of buildings on that place and any improvements that were made there after it passed out of the hands of Mr. Breck.
A. I know there was a building on there, and it was removed to another position on the property, and a new one was erected.
Q. The old building that was moved was one that Mr. Breck lived in?
A. Yes, sir; he used to occupy it.
Q. It was moved into another position, and what was done?
A. A new building was erected.
Q. Do you know who erected that, who had charge of it, and who was the general supervisor?
A. In the carpenter work, Mr. Weltner; the general manager, I suppose, was Mr. Sutton.

Defendant moves to strike out the last clause as being hearsay.

Q. State what you know.
A. He was then.
Q. State what you know about it.
108 A. I know I was onto the premises a good many times and saw Mr. Sutton in the act of directing, and so on. Besides I know that in my office I drew a contract whereby Mr. Sutton——

(Objected to.)

Q. Between whom did you draw the contract?
A. Between Mr. Sutton and Jacob Weltner.
Q. For the erection of this building——

(Objected to; the contract will show.)

Q. Have you the contract with you?
A. I have, sir.

(Witness produces contract.)

Plaintiff introduces in evidence contract, bearing date September 2d, 1881, copy of which is hereto annexed; and it is stipulated between the parties that it may be treated in all respects as if it were the original. Marked "Plaintiff's Exhibit A."

(Objected to by defendant.)

Q. What was done with this contract after it was executed by the parties?
A. It was left with me.
Q. For safe keeping?
A. Yes, sir.
Q. It has been in your possession from that time until now, and is now?
A. Yes, sir.
Q. I would ask you to state what you know, if anything, in relation to Mr. Weltner carrying out that contract in building the house.

(Objected to as immaterial.)

A. I only know that I was there several times during the process of the building, and saw him there at work.
Q. State what you know, if anything, as to who had the general supervision and management of the property there during the time that the building was being erected.
A. Charles Sutton.
109 Q. The husband of the plaintiff?
A. Yes, sir.
Q. You may state what you know, if anything, about the property being insured.

(Objected to as immaterial.)

A. I insured the property in November of 1881.
Q. At whose request?
A. At the request of Mrs. Sutton, the plaintiff.
Q. You may state what took place in relation to it.

(Objected to as irrelevant, immaterial, and improper, and as calling for declarations of the plaintiff.)

A. Mrs. Sutton came to my office and said she had a job for me——

Q. State generally as to the fact whether you insured it at her request.

A. She said she had a job for me in insuring her place, The Oaks, and I asked how much she wanted, and how far the building had progressed, and she said she supposed I had looked at those things. She then wanted to know the rates. I told her. She wanted me to place upon it $2,000. I said I would go up and examine the property. I went to the house and examined it, and placed an insurance of $2,000 on it.

Q. When you went to examine the property state its situation, and who was the manager of the property apparently.

(Objected to.)

Mr. JENKINS: State what was being done.

A. The carpenters were at work there; the plumbers were putting in gas pipes and water pipes. Mr. Sutton, I think, was not present; had gone away after something, and Mr. Kenyon came out to the carriage and escorted me to the house and through the building, taking me into the basement, and from there to the top of the house.

110 Q. What did Mr. Kenyon say about the matter, if anything?

(Objected to.)

A. I told him Mrs. Sutton had come to me and wished me to insure the building.

Q. That was John S. Kenyon?

A. Yes, sir; and he therefore took me through the whole building, in the basement, showed me the tea-room ——

Q. What did he say, if anything?

A. Nothing; only it was Mrs. Sutton's tea-room. Going to the main story of the building he drew my attention particularly to the fire-places, and spoke of the size and shapes of the chimneys, and remarked that the building was larger than they had at first intended it to be; in fact he said Charley drew the plans and got some of the doors so they conflicted, and it was afterwards remodeled and made about two feet larger than he should have built, but he said, "It is as they want it; it is the children's; it don't make any difference to me how they fix it."

Q. What else did he say to you?

A. He showed me up into the chambers; showed me Sortie's room, my room, Milly White's room—those are the expressions he used in showing me about the building. He showed me the rooms, and pointed them out, and said, "This is Sortie's room; this is Charley's; this is mine; this Milly White's, or the young children when they come visiting."

Q. Whom did he mean by Charlie and Sortie?

A. Mr. and Mrs. Sutton.

Q. Is Mr. Sutton called Charlie?

A. Yes, sir. Mrs. Sutton had always been familiarly called by us Sortie; also Mr. Kenyon spoke of her as Sortie.

Q. "My room;" what was that?

111 A. He meant his room; the room he was to occupy. Milly White is a niece of Mrs. Sutton.

Q. How were those rooms with reference to being adjacent to each other?

A. I cannot state positively, but I think they were all made to open together, so they would be as one room—all opened into each other—made a suite of rooms connected.

Q. Go on and state what further he showed you and stated about the building.

A. He said: "We will go up the next story if you dare." The carpenters had just finished putting up the stairs. It was open clear through to the basement. It looked a little pokerish. We went up into the upper story, and Mr. Kenyon pointed out to me on the west side of the house a place, and says, "There is Charles' room." I asked him how many rooms Mr. Sutton occupied. He said that was Charles' gun room. He said that was the first time he had been up there; he never had been over the house.

Q. Anything else said or done by him while showing you about?

A. In passing through the house and talking about the insurance Mr. Kenyon asked me if I did not think that Sortie ought to have a carpenter's risk on the building, as it would be but a little time before they would leave, and then the house was to be left for Mr. Van Horn to lath; he would take his time during the winter—work just when he could work. I thought it would be a good idea, as any other insurance agent would.

Q. Anything further?

A. I don't know as there was in connection with that. I placed the insurance upon the building.

Q. To what amount?

A. $2,000, the carpenter's risk for thirty days.

Q. Who settled with you for that?

A. Mrs. Sutton.

112 (This testimony is objected to.)

Q. I will ask you if you were down there often; and, if so, about how often, and what you saw being done there, and who did it, and who was apparently the manager of the concern?

A. I could not say. I used my horse and carriage very often, and often in my drives drove through the grounds from 1880 until the present time. In 1880 I was there. I think they were building the barn. I saw the barn. Mr. Sutton showed me the plan of the barn.

Q. That was in 1880?

A. Yes, sir. I went into the boat-house with him.

Q. That was in 1880?

A. Yes, sir.

Q. Mr. Sutton showed you the barn?

A. Yes, sir.

Q. Go on.

A. And the boat-house.

Q. You saw the boat-house?

A. The boat-house was down on the bank of the lake—boats in it—sails in it—traps and things that Mr. Sutton worked with there in repairing and fixing up his boats.

Q. Go on and tell the whole down to the present time, all there is connected with it, so far as you know.

A. I don't know what to tell. I have driven in there a great many times, and been through the premises in 1881, after the old house was removed on the new foundation. I saw it being moved there. I was there after it was moved.

Q. Who was managing that?

A. After it was partially repaired I went through the house with Mr. Sutton. I went through it two different times in fact.

Q. Did Mr. Sutton show you through both times?

A. Yes, sir. I often went up and saw the improvements they were making.

Q. I would ask you to state what you know, if anything, as to who had the keys of the buildings?

A. Mr. Sutton had the keys to the house and the boat-
113 house when I passed through and looked them over.

Q. Had the keys to the old house?

A. Yes, sir; there were no doors then to the new house. The workmen were there. I was on the premises after they went away several times; drove in there for a drive.

Q. If you saw anything in the old house, furniture or anything, at any time, state that.

A. No; I think not. The first time I was there the debris was around; the second time it was not done; I only went into the basement—that is, through the lower part, to see more especially some mantels; they were fixing fire-places; they were not done.

Q. I will ask you to state what you know, if anything, in relation to Mr. Kenyon's living in the family of the plaintiff, and while he was living there what he said in relation to what he was doing or what he was going to do.

Mr. JENKINS: Fix the time of the conversations.

A. In 1872 I first knew Mr. Kenyon. He was then boarding at my brother's house, and was with Mr. and Mrs. Sutton; they were considered as one family; the family were boarding at my brother's, and in 1874 my brother broke up housekeeping, and the Suttons moved into another part of the town, where we often visited them and they us. Mr. Kenyon was a part of the household, and considered by us; supposed to be by us a man in rather delicate health—was known, I should say, and particularly in charge of Mrs. Sutton; she was caring for him; was in fact, to my knowledge, so far as I know anything of them, his constant attendant in rides, visiting, &c.

Q. How long did that continue?

A. As long as he was here.

114 Q. You may state what he said to you as to what he was doing in relation to this property for her, if anything.

A. I don't know that he ever made any special remarks, only always, at different times when I have been to the place, in conversing of things they were doing, he represented to me it was for Mrs. Sutton—for the children.

Q. Can you give his language, what he said at any time? If so, you may give it.

A. In examining the outside of the house, taking notice of the different gables, one day, he remarked that he didn't think he would have been apt to have made every gable different, but the children wanted it; it didn't make any difference to him; it was theirs. I could not state special conversations. I know it was the general impression——

(Objected to.)

Q. State as to the fact whether he made any statements in relation to the building of the house, if its size, and so on, for any particular object.

A. Not to me. I never heard him. He remarked it was two feet larger than they had expected to build it.

Q. Do you think of any other conversation with him in relation to that property?

A. In the spring of 1881, after, I think, their return from New York, we were invited to Mrs. Sutton's, and Mr. Kenyon asked Mr. Sutton to exhibit to us the plan of the new house they were to build, and asked our opinion in regard to it. I say "our;" there were other members of our family that were invited there to tea.

Q. Go on and state what he said about it in that connection.

A. Mr. Sutton got the plans, and we were examining them; he said the children wanted rather of a large house; got rather of a large house; asked my opinion as to how it would look on the banks of that lake.

Q. Well?

115 A. I don't know as there is anything else, only he spoke of it as the children's.

Q. Did he state any object they had in view, keeping boarders or anything?

A. No, sir; not to me.

Q. Do you think of anything further?

A. I do not.

Cross-examined by Mr. JENKINS:

Q. Where is that policy of insurance?

A. I don't know; I delivered it to Mrs. Sutton.

Q. When did it expire?

A. It has not expired; it is yet in force.

Q. Who was the insured named in that policy?

A. John S. Kenyon.

Q. You have stated that when you went through the building on that examination of it that you made, Mr. Kenyon accompanied you; that he spoke something in regard to the plans and their alteration or enlargement of the building. Will you be kind enough to repeat now just what it was that Mr. Kenyon said in regard to that, or in connection with that. Give us as nearly as you can remember his exact language.

A. After looking at the chimneys—it was in reference to some particular door, which one I cannot now say—they had made the chimneys, I think, all across the corners. Mr. Kenyon said in their first plan the house was smaller, there being a couple of doors that conflicted, and that they had enlarged it, made it two feet larger, larger than he would have built it for himself, but it was for the children, they did it to suit themselves, or to that effect.

Q. Will you be kind enough also to repeat, as nearly as you can remember, his exact language in regard to the gables?

A. He said that the gables were all different, probably not quite as he would have made it if he had made it for himself, but the children liked them; they were made to suit them, as they
116 wanted them.

Re-examined:

Q. Will you state how you came to put the name of Mr. Kenyon in that policy, why you put it there, what was said about it?

Objected to as calling for the declarations of Mrs. Sutton.

A. Because on asking Mrs. Sutton in regard to it she said the title to the property was yet in Mr. Kenyon's name, and I could not write an insurance policy with the title in somebody else's name.

Q. Is that why you placed it there?

A. Yes, sir.

Q. You learned from her that the title was in Mr. Kenyon's name, so you put the policy of insurance in his name?

A. Yes, sir.

WILLIAM K. WASHBURN, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. At Oconomowoc.

Q. How long have you resided here?

A. 40 years.

Q. I will ask you to state whether you are acquainted with the plaintiff, her husband, Mr. Sutton, and were you acquainted with John S. Kenyon in his lifetime?

A. Yes, sir.

Q. How long were you acquainted with them?

A. I think it must be ten years.

Q. I will ask you to state whether you are acquainted with this place in controversy, called The Oaks.

A. The Breck place?

Q. Yes, sir?

A. Yes, sir.

Q. How long have you known that place?

A. I first went onto that place to look it over the last of September, 1880, to see what to do on the premsses, putting it into shape.

Q. I will ask you to state what particular business you were engaged in?

117 A. Mr. Sutton engaged me—

Q. I mean what class of business?

A. Grading up and fitting up these lawn places round the town.

Mr. JENKINS: Landscape gardener?

A. Yes, sir.

Q. You may state whether you at any time visited these grounds; and, if so, when and at whose request, with a view of grading them and improving them.

(Objected to, so far as it calls for the request of any one but Mr. Kenyon.)

A. I went over there to look the premises over on the very last of September or the first of October, 1880. I went over and looked it over, and we wanted to see whether it was best to move the old house round or use it for a barn, or what to do with it, and fit up the grounds. Then, on the 4th day of October, 1880, I went there with a force, hired the men myself, and went to work grading and digging out for the boat-house under the direction of Mr. Sutton.

Q. Go on and state about the work you did there.

A. After I got the boat-house foundation graded out and fixed to his idea, then I went at the foundation where the barn is, and fixed that ready for the barn and graded off the lot all around next to the lake and fitted up the bank and the driveway, and then excavated a place for the old house to stand. I was there just a month.

Q. Who engaged you to do this work?

A. Mr. Sutton.

Q. Who paid you?

A. Mr. Sutton says come up to the house and get your pay. We went up there and the money was handed to us in envelopes, our time, every week.

Q. Mr. Sutton handed it to you?

A. Yes, sir.

Q. I would ask you to state as to what work you have done since then.

A. I was there the next February after and moved the old
118 house onto the foundation. That was in February, 1881, the 19th of February, and I was working at it and fixing up around there until the 18th or 19th of March at different times. It was stormy. We didn't stay there much of the time. I took supervision of it myself.

Q. At whose request did you do this work?

A. It was sent on from New York by Mr. Sutton.

Q. Mr. Sutton wrote on to you from New York, and you went on and did that?

A. Yes, sir.

Q. Who paid you for that?

A. A check was sent on from New York, and I paid the men off and sent back a receipt.

Q. When next did you do work there?

A. The fall after.

Q. What was that?

A. Grading a driveway and fixing up generally. That was the fall of 1881.

Q. About how late in the fall?

A. That was about the 20th of August. I went to the island the 25th, and I took my teams right over from that place. Mr. Peck came to me and wanted to know why I didn't come quicker. I said Mr. Sutton wanted me to work one more day, even up the drive.

Q. Who was in possession of the property and had control?

A. Mr. Sutton had the control all the time I was there; he had the keys to the boat-house and everything unless I had them myself to put the tools and things into the old house before it was moved. That was in 1880. He had scythes and tools there every day.

Q. Where did he have them?

A. In the old house.

Q. And had the keys to the old house?

A. Yes, sir; I helped him get his boats into the boat-house that fall before they went away; got that all filled up with the boats and traps.

119 Q. Mr. Sutton's boats and the sails?

A. Yes, sir; that was in November, 1880.

Q. I would ask you to state if you had a conversation with Mr. Kenyon in relation to what was being done.

A. He was there every few days. He said he was fixing that up for Mr. and Mrs. Sutton; said he thought it would make a nice home. He usually used to come down after Mr. Sutton about ten or eleven o'clock, then go back to dinner; he was only there in that way, and Mrs. Sutton was down most every day, except when it was stormy. They were looking over the ground every time they came to see how they would have them fixed, and the trees moved and taken down.

Q. Who gave direction?

A. Mr. and Mrs. Sutton and Mr. Kenyon; they were al- together about that; they *was* always inquiring my opinion how to fix those things.

Mr. JENKINS: Who?

A. Mr. Sutton, Mrs. Sutton, and Mr. Kenyon.

Q. I will ask you to state if anything was said by Mr. Kenyon to you in relation to Mrs. Sutton's having possession of the property.

(Objected to as leading.)

Q. If so, you may state what was said.

A. He didn't say anything particularly. He said that was their place. He told me he was fitting that place up for them. There was no talk about possession, because they were there.

Q. I will ask you to state who had possession of that property.

A. I considered Mr. Sutton had possession; he was there every day; he was there and directed, and was working every day, and worked on the boat-house—and fitting up things generally.

Q. Did he have the keys of the property?

A. The keys of the house and the boat-house.

120 Q. Everything was under his control?

A. Yes, sir; he was the last man away every night.

Cross-examined by Mr. JENKINS:

Q. Whose check was it that was sent from New York?

A. This check was sent from the Savings Bank, New York; I think it was sent by Mr. Kenyon.

Q. Was it Mr. Kenyon's check, signed by him?

A. It seems to me it was signed by the president of the concern.

Q. And was signed by Mr. Kenyon?

A. I suppose it was.

Q. What do you mean you "suppose" it was?

A. I think the first one was payable by the president of the bank to me.

Q. You say it was sent by Mr. Kenyon?

A. I suppose it was.

Q. What do you mean by that?

A. I suppose it was a draft on the Savings Bank of New York.

Q. A draft by whom; who drew it?

A. I think by the bank folks themselves.

Q. Then it was not a draft?

A. Mr. Kenyon was an officer of the bank; it came from that bank, any way.

Q. Mr. Kenyon sent it to you?

A. I suppose he did.

Q. Did you get it in a letter from Mr. Kenyon?

A. Yes, sir.

Q. Where is that letter?

A. I don't know.

Q. Have you got it?

A. No, sir.

Q. What did you do with it?

A. It is probably among the old papers burned up.

Q. You do not preserve your letters?

A. Not always; no, sir.

121 Q. Do you preserve letters as old as that?

A. No, sir.

Q. You say that Mr. Sutton had the keys of this place?

A. Yes, sir.

Q. Where were they kept?

A. I suppose in his pocket.

Q. Where were they kept when he was not there, and was at home?

A. I kept them a good deal of the time when I was there myself.

Q. When Mr. Sutton was at home, where were they kept? Were not they kept at the house?

A. No, sir.

Q. When you wanted to get the keys, did you go to the house?

A. Sometimes I had to go to the house for them.

Q. Whom did you get them from?

A. Mr. Sutton.

Q. Always?

A. I think so. I don't think I had to go for them more than once or twice.

Q. Mr. Kenyon lived with Mr. Sutton?

A. Yes, sir.

Q. How often was he on the ground?

A. Every day or two; sometimes only in three days; sometimes he came about 11 o'clock and took Mr. Sutton to dinner.

Q. What did Mr. Kenyon do when he was there?

A. Walk around and see how things were getting on.

Q. Talk to you about what to do and how to do it?

A. No, sir.

Q. What did he say to you?

A. Wanted to know if I didn't think it was a beautiful situation, nice place, and I told him I thought it was.

Q. When was the last time you had anything to do with that place?

A. 1881, in the fall, August.

Q. You were not there after August?

A. No, sir. I was there before they commenced the house?

122 Q. When was it that Mr. Kenyon said he was fixing it up for Mrs. Sutton, and that it would make them a nice home?

A. In the fall of 1880, October, before he had commenced to build, before he had moved the house or anything, except the barn; basement of the barn was up, and the excavating I done for the old house, and the boat-house was built.

Q. At what other time than the time you received this check did you receive money from Mr. Kenyon?

A. Not at any time.

Q. These envelopes with money——

A. Were generally handed to us at the door.

Q. By whom?

A. By Mr. Sutton, and sometimes by Mr. Kenyon. They had them all fixed up ready, so I paid off the men in that way.

Q. The amount was accurately counted out and enclosed in an envelope, and was handed to you sometimes by Mr. Sutton, sometimes by Mr. Kenyon, just whoever came to the door?

A. Yes, sir.

JACOB C. VAN HORN, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. In Oconomowoc.

Q. How long have you resided here?

A. Nine years.

Q. Are you acquainted with this place called The Oaks, in the second ward of the city of Oconomowoc?

A. I never heard it by that name.

Q. What name did you hear it by?

A. Breck place.

Q. I would ask you to state if you have done any work on that place?

A. Yes, sir; I have. I built most of the chimneys. The chimneys was built up to the first floor when I commenced. I finished all the chimneys, and then I done all the back plastering.

Q. When was that?

123 A. I don't remember the date; I am a poor hand to remember dates. It was the time the house was built there. I could not say the date.

Q. Who was building?

A. Mr. Sutton.

Q. Who was the carpenter?

A. Mr. Weltner was the head boss of the carpenters.

Q. You worked for Mr. Sutton?

A. He was the man that paid me; yes, sir.

Q. Who hired you?

A. Mr. Sutton.

Q. You mean the husband of the plaintiff?

A. Yes, sir.

Q. You cannot fix exactly the date when you went to work there?

A. I could not; it was the fall they were building there.

Q. Who apparently had the charge of the general supervision of everything there?

A. Mr. Sutton must have had the charge and management of everything.

Q. What do you know as to his having the keys of the building?

(Objected to.)

Q. State what you know about matters.

A. I don't know much about it, only I was to work there, and built the chimneys and done the back plastering for Mr. Sutton, and he was the man that paid me.

Q. That is about all you know of it?

A. Yes, sir.

Q. Did you work there after that in the winter?

A. After they left for New York I made a contract with Mr. Sutton to do the lathing; that was the contract.

Q. What time was it that you made that bargain with him?

A. Just before they left for New York a few days.

Q. In 1881?

A. It was the fall they left for New York. I could tell the dates if I was at home.

Q. You made a bargain with Mr. Sutton——

(Objected to.)

124 Q. Go on and state what you did do.

A. I made a bargain with Mr. Sutton to do the lathing for

2 and ½ cents or 3 cents a yard, whatever there was in the building. I done all the work, and when we came back in the spring, says he——

(Objected to all declarations of Mr. Sutton.)

WITNESS: We made a bargain for the lathing at 2 and ½ or 3 cents a yard. Says he, in the spring, when we come back from New York, I will pay you for that work." I says, "All right; that is time enough." So I finished the work in the winter; got through about Christmas.

Objected to, and motion to strike out all that part of the answer which contains any statements or declarations of Mr. Sutton as mere hearsay, and irrelevant.)

Q. In pursuance of that did you go on and do your lathing?
A. Yes, sir.
Q. Finish it up?
A. Finished it up.
Q. John S. Kenyon that winter died in New York?
A. Yes, sir.
Q. I will ask you if you got your pay?
A. I have.
Q. You made out your bill and sent it to New York, and the money was sent to you?
A. Yes, sir.

Cross-examined:

Q. Who paid you?
A. Mrs. Williams paid me.
Q. Whose money was it?
A. I don't know.
Q. Whom did you send your claim to?
A. She sent in my claim to parties; I don't know who.
Q. Did she send it to the executors of Mr. Kenyon's will?
A. I don't know, of course.
Q. Whom did you employ her to to send it to; you employed Mrs. Williams to do something with your claim?
A. Yes, sir; I had her send in my claim.
Q. To whom?
A. I don't know.
125 Q. How would she know to whom to send it?
A. I didn't ask her.
Q. Did not you understand it was sent to the legal representatives of Mr. Kenyon?
A. I suppose it was.
Q. Didn't you swear to it?
A. Yes, sir.
Q. Was it not a bill made out against — estate of Mr. Kenyon?
A. Yes, sir.
Q. Why did not you go to Mr. Sutton for it; he is the man who employed you?

A. Yes, sir.
Q. Why did not you go to him for your pay?
A. He told me to put in my bill.
Q. Mr. Sutton told you to put in your bill to the estate, didn't he?
A. Yes, sir.
Q. When was that he told you; after he returned from New York in the spring?
A. Yes, sir.
Q. And after Mr. Kenyon's death?
A. Yes, sir.

COOLEDGE EASTMAN, called by plaintiff, being sworn, testified:

Q. Where do you reside?
A. Oconomowoc.
Q. How long have you resided there where you now live?
A. About 30 years where I now live.
Q. How near are you now to this place in dispute, called the Breck place?
A. It is about 20 rods, I guess, to the place. It was part of my farm; I sold it to Breck.
Q. Then you are well acquainted with those grounds?
A. Yes, sir.
Q. I would ask you to state if at any time you had a conversation with John S. Kenyon in relation to this property in connection with the plaintiff? Go on and repeat the conversation, if you had one.

Mr. JENKINS: Find out when and where it was.

Q. State where and when, if you had a conversation with him.
126 A. The first I recollect of talking with him he came to me and wanted to know—I think it was in 1880—if I could buy Johnson out; he said he could do nothing with him, he was such a crabbed kind of a man. He wanted to know if I could not manage him. I said that I thought I could if anybody could; he had always lived right by me, and would generally hear to what I said as quick as he would from most any one. He said he had tried to buy the property and could not. All there was said he said he would like to have me see what I could do. He wanted to get this property so as to have it settled as soon as he could.
Q. Settled? What did he refer to, do you know?
A. He spoke about having it joined on with his place, as it used to belong to it. Breck sold it off; I sold it to Breck. He sold his three acres to Johnson, and he was rather troublesome. His cattle used to run back and trouble them. He wanted to get it back on the place, so he could have it altogether. He spoke in this way. He says: "I want to get it so the children won't have any trouble.' That is the way he spoke about it.
Q. You may go right on. What further was said at that time or afterwards in relation to it?
A. I went and tried to buy the place. I could get along with the man very well, but I could not with the woman. She did not want

to sell; she was afraid her husband would squander the money if he got hold of it. Then there was no more said about it until in a letter just before his death—two or three days, I think, before his death.

Q. In relation to that matter?

A. Yes, sir.

Q. During his life did you have a conversation further about the property, the main property?

A. Before this there was some trouble between him and Judge Small about the lines. He wanted me to come over and show
127 him where the lines were; where Judge Small and I settled the lines. I went over and showed him. It appears that Judge Small before this a few days had got Hathaway and told him where to run the lines, and he run them near the barn, so it took a road that Mr. Sutton had built down to the lake. He said he didn't care anything about the lines himself; he would not quarrel about the lines at all, but he wanted to have it settled while he lived, as he was a-fixing of it up for Mr. and Mrs. Sutton.

Q. After that, at any time, what took place?

A. After that they agreed to leave it to a surveyor, and the surveyor came on and wanted me to go over. I came over the day they surveyed it through. He said he would like to know if this surveyor laid the lines anywhere near where Judge Small and I had settled on the line. We didn't pretend to give any line, but we started at a quarter stake on the Watertown road, and ran through to the lake. He said he was willing to let the line go there, and I was, so we settled on that point. After this I went over again; I see him building the fence; I met Mr. Kenyon somewhere near half way from the lake to the road, and Mr. Sutton was ten rods further ahead building a fence, and I asked Mr. Kenyon why he built such a high fence back here; it didn't look well. I said I would take it down to three and one-half or four feet. He said, "That is my mind; if I was building it I would not put it higher." The fence was about four feet high, but a little further ahead they had raised it up; it looked to me to be about two feet higher; it may not have been; it looked like that. I kind of laughed at him for raising that fence up so much higher. He said it was nothing to him; Mr. Sutton was building of it for himself; he had nothing to do with building the fence; he said he didn't care so much about it himself.

128 Q. Anything further said?

A. He said he would like to have it fixed up; he was going to New York. I says, "Ain't you going to make this your home winters?" He said when they got things fixed up he should make it his home here another winter with Mr. and Mrs. Sutton; stay with them as long as he lived.

Mr. JENKINS. When was this?

A. It will be two years ago, I think, about May or June; I can't tell just the time; somewhere about that time.

Q. Is that all the conversation you had with him?

A. I don't think of anything else.

Q. Were you over there frequently on the ground where they were?

A. No, sir; I was not. I met Mr. Kenyon quite often, but I don't know as I met Mr. Sutton that winter. I may have spoken to him once or twice, but I don't recollect; he was busy; I heard about the place, so I don't think I went there at all.

Q. Is that all the conversation you remember having with him in relation to the property?

A. Pretty much. There may have been something more said about this piece of land, but I don't recollect now.

Cross-examined by Mr. JENKINS:

Q. At this time you speak of in regard to the fence, you say you saw Mr. Kenyon working at the fence?

A. I don't know as he was at work at it; he was looking around, and I met him.

Q. Who else was there at that time?

A. Nobody with him.

Q. What was he doing?

A. Looking along; I don't know.

Q. Doing any work?

A. I don't think he was.

Q. Any one else at work at the fence at the same time?

A. Mr. Sutton was at work, but alone.

129 Q. Mr. Sutton was also at work there?

A. Yes, sir; off a piece.

Q. How far from you?

A. I think ten rods or so.

Q. Mr. Kenyon said he would not have that fence so high himself?

A. Yes, sir.

Q. But it was Mr. Sutton's fancy?

A. Yes, sir. He spoke at the same time about fixing it up for Mr. and Mrs. Sutton or the children. The way he called them was his children; he said he had lived with them and made it his home, and expected to as long as he lived, and he was fixing this place up for them.

Mrs. D. W. SMALL, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. At Oconomowoc.

Q. How long have you resided here?

A. 32 years.

Q. Are you acquainted with the premises known as the Breck property?

A. Very well.

Q. They adjoin your place?

A. Yes, sir; on the west.

Q. Were you acquainted with John S. Kenyon in his lifetime?

A. I was.

Q. Are you acquainted with Mrs. Sarah S. Sutton?

A. Yes, sir.

Q. I will ask you to state if you had a conversation at any time, if so, state when and where, with John S. Kenyon in relation to the condition of that property that is in dispute here, known as the Breck property

A. I have talked with Mr. Kenyon on different occasions, probably a dozen, but the first pointed conversation was, I think, last spring, at the time that Judge Small and he were surveying the line between the premises.

130 Q. When they had some little dispute as to the division line between the two places?

A. Yes, sir; he came to the house.

Q. State that conversation.

A. He came to the house, inquired if Mr. Small was making a survey; I told him he had; that the line had been surveyed to his satisfaction so far as it was located, but if there was any question he wanted it legally and properly located; if there was any mistake he wanted it decided. Mr. Kenyon made the remark that was satisfactory to him, as he was particularly interested in having the question settled now. He said, "You know, Mrs. Small, from conversations we have had, this property is not for my own especial interest, but I am interested in preparing it, or fixing it, for Mrs. Sutton. I want the title settled while I am living; I don't want any dispute hereafter?" I said that was satisfactory to us; Mr. Small would have a surveyor there on such a day; he said he would meet him, and was very happy to know the fact. We went on with an extended conversation about the intention of the building and plans; that was the point he made; it was his wish to have it settled, because he did not expect to keep the premises himself, but he wanted it for Mrs. Sutton; he wanted it settled because he did not want any litigation hereafter.

Q. Was there any other conversation you had with him?

A. Yes, sir; a year ago last October Mrs. Col. Shaler and I drove into the grounds, and he was working in front of the building; Mr. Kenyon was picking up obstructions and working around the garden. We asked him if we were intruding. He said no; he was was happy to have his friends come in and see what he was doing. Mrs. Shaler made the remark he was building a very handsome house. He said yes, he was trying to make something com-

131 fortable and homelike. She said it was quite a large house, and asked him what family he had. He laughed and said it was not exactly for himself; it was for Mr. and Mrs. Sutton; "I call them my children." He said: "I have consulted with Mrs. Sutton as I go on with my plans, and we always have to make some additions as we are building, and the building has grown larger than we first planned. It is larger than we first intended." He said: "It is for her, and I don't consult my own wishes in the construction and arrangement of the building." She asked how long he had lived there; some questions of that kind; I don't remember his distinct answer, but he said he had made his home with Mrs. Sutton; she had taken care of him in sickness and health;

he wanted to see her comfortably settled; and she asked what the other building was for? He says: "It was on the ground; we first thought we would tear it down;" but finally he said "he thought perhaps, as they had no children, they might be lonely, and a neighbor would be company for them, so he concluded to fix up the little cottage and make it so it would not be an objection to the premises, and if they saw proper to rent it or take boarders, they can utilize it in that way. She says you expect the two houses to be used in connection?" "Yes," he says, "it will all be for their use." He asked us to get out and see the house, but we objected, as there was plaster and some obstructions there. He told us to drive along further, and he would show us the plan. He pointed out the breakfast room; he said he was anticipating taking breakfast in that room with Mr. and Mrs. Sutton a few times, although he was getting old. He showed the dining-room, billiard-room, and parlors, pointed out each room, and said how he anticipated the use of it. He said he hoped to enjoy it with them, and if they saw proper to take
132 boarders and rent the little house, to have a companion or neighbor near by, he thought it might be useful.

Q. Was there any other conversation?

A. That was the tenor of our conversation. Mrs. Col. Shalor asked him some questions about his acquaintances in the East and his opinion of the West; we talked together there perhaps for an hour. That was the subject, appertaining to Mrs. Suttons's interest in the home.

Q. That was in October last?

A. Mrs. Shalor remained with us until the first of November.

Q. It was in the month of October, 1881, was it?

A. 1881. It was not very long before they left; they left that fall and went East. I know Mrs. Shalor remained with us until the first week in November. It was some time before she left we drove around.

Cross-examined by Mr. JENKINS:

Q. How long had you known Mr. Kenyon?

A. I cannot tell the date. I have known him ever since he came to Oconomowoc; ten years, I should imagine.

Q. Was he a man that was reticent in speech in respect to his own matters?

A. I should say that he was.

Q. Had he ever met Mrs. Col. Shaler before this day?

A. No, sir; I introduced them.

Q. In reference to this first conversation that you had with him in regard to this division line, will you be kind enough to tell me just what it was that he said and the language he used, so far as you can remember it, and the order in which he said it?

A. He asked the question, making known his errand, which was to know if Mr. Small had done anything in regard to a survey. They had had several interviews, I imagine, about it. In the morning he told me he had engaged a surveyor, and the work was to be

done on a certain day. He said he was very glad to know he
133 had done so, as he was anxious to have the line settled. I told him Mr. Small was satisfied with the line as it was then, and he smiled and said he supposed so; but as there was a question about the line — it had lain differently, he wanted it decided whilst he had control of the property. He said: "This property, of course, you know is not intended for myself; I want to make it a home for Sortie," or else he would speak of them both as the children.

Q. That day did he say for Sortie, or for the children?

A. That day he said for Sortie. "I want the line established whilst I have possession, because I intend it, as you know"—because we had had conversations before about the matter—"for Sortie; I don't want any litigation after I am gone." That was the point of his conversation. "I want it settled now; I don't want any litigation after I have given up the property." I don't remember exactly whether he said after he was gone or after he had given up the property; but it was for Sortie he wanted the line established while he was in possession.

Q. That conversation was when?

A. I think in the spring of 1882, if I am not mistaken. Other parties know when the survey was.

Q. You do not mean the spring of 1882?

A. It was the spring of 1881, because the survey was in the spring, and they commenced the building in the fall.

Q. State any other thing he said at that time you remember in respect to this matter?

A. About the survey?

Q. No; the reasons why he wanted the survey?

A. Because he said he wanted to make a home for the children; that was his expression. He said, "You know I wish to make a home for the children."

Q. Was it Sortie or the children?

134 A. Sortie he mentioned as wishing it decided for; he afterwards spoke of them as the children.

Q. That he wished to make a home for the children?

A. Yes, sir. But it was Sortie he wished to have the matter decided for, because he did not expect to be with them always, and he wanted a home for the children.

Q. Did he say he intended to go away, or did he say it with reference to his death?

A. With reference to his death.

Q. He did not speak of leaving here?

A. No, sir; his health was not good; that was a common expression. He complained very often of being feeble; he spoke then entirely with reference to his length of days.

Q. He expressed the apprehsion or the thought he would not live a great while, and he wanted this fixed so the children should have a home after he was gone?

A. Yes, sir.

Q. He did not want any litigation after he died?

A. Yes, sir; he wanted to see it settled whilst he was living.

Q. What was it he said?

A. As I have stated it before, he did not expect to occupy the premises for any length of time, he should not be with them for many years, or he should not be there—I cannot repeat the exact words. He often said he did not think he should live a great while; his health was poor; he did not know how long he should be spared. He spoke of it then in the same way he did frequently.

Q. He anticipated death very soon?

A. Not immediately; but that he thought he should not live to be a very old man. That was his general expression.

Q. Do you know about his age at that time?

A. I do not know that I ever heard his years mentioned.

Q. What age did he appear to be?

135 A. I should say his appearance would indicate him to be a man near 70.

Q. Will you be kind enough to repeat to me as nearly as you can in his exact language what he said to you in regard to the house at the second interview, with reference to its being larger than was intended, or, in answer to a question of Mrs. Col. Shalor's, it seemed to be a large house, or when she asked him in regard to his family?

A. He said—one part of the conversation I remember distinctly was: "You never commence a house and complete it exactly according to your first ideas," and that the house was larger owing to suggestions, and he made the remark as Sortie had made suggestions, and when they came to look them over they had found them feasible, the house had been enlarged to meet different suggestions; consequently before it was finished, before it was enclosed, they had made a larger house than anticipated in the beginning.

Q. In that conversation did you use the word "Sortie?"

A. Yes, sir; that is where he used the word "Sortie;" it was in regard to his own length of days he spoke of the children.

Q. He used that expression to Mrs. Col. Shalor?

A. Yes, sir; and to myself. I cannot tell whether Mrs. Col. Shalor or I made one or the other remark. He was talking with me more directly than with her, only as she was introduced, and occasionally asked a question.

Q. You said in your direct examination that this statement was made in answer to a suggestion by Mrs. Col. Shalor that it was a large house, and asked him in regard to his family?

A. Yes, sir; she asked him.

Q. Then he used that expression it had been enlarged from time to time upon the suggestion of Sortie?

A. Yes, sir.

136 Q. And he used that expression in answer to her remark that it was a large house?

A. Yes, sir.

HARVEY B. ANDERSON, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. Oconomowoc.

Q. How long have you resided here?

A. I think since 1868.

Q. Are you acquainted with the premises, known as the Breck place, that are in dispute in this action?

A. I am.

Q. Were you acquainted with John S. Kenyon in his lifetime?

A. Yes, sir.

Q. How long were you acquainted with him?

A. I think nearly all the time since I have lived here. I do not remember when I first saw Mr. Kenyon.

Q. Are you acquainted with the plaintiff, Mrs. Sutton, and her husband?

A. Yes, sir.

Q. How long have you been acquainted with them?

A. It strikes me most of the time since I have lived here. I think I came here first, but I am not positive about that.

Q. You may state as to the fact whether you had any conversation at any time with Mr. Kenyon in relation to the disposition of this property, on his part, what he was going to do with it—anything to that effect.

A. I had conversations with him. The first conversation I had with him was very soon after he bought the place, as I walked down from my place with him, as he was walking from that place down town, coming this way—I am speaking of the Breck place; I had heard the statement then that he had bought this place, but I did not know, and I asked him the question in these words: That I heard he had been buying a farm, and asked him if it was true
137 if he had bought this Breck place. He said he had, and I said to him—to just give the words as they came both ways—that I was very glad, because it looked like his becoming a permanent resident. I asked him if he did feel anything like a granger. He said he could not say that he did, as he did not buy the place for himself. He had bought it for Mrs. Sutton, who undoubtedly would be a permanent resident, although he should make it his home undoubtedly with them while he remained here, as he had for several years made their place his home. He used very nearly those words. Then, furthermore, he said in buying the place in that way for a home, the grounds were large—speaking in connection with its going to her—were large enough to keep a cow and a horse, and raise vegetables for the family, more than any family could use, and he thought having the place would be a great benefit to Mr. Sutton, as he needed more outdoor exercise than he had, and that exercise he would have in taking care of the place; and, further, it would please him also when he was with him, as his physician had directed him to have more outdoor exercise than what he had been having. At that time we were going down town and passed along, and that at that time, so far as I remember, was all that was said.

Q. Did you have any talk with him at any other time?

A. Then, when we were talking this matter over, my wife wanted to know if there was not a prospect then for renting Mr. Sutton's old place, as she would like to be on that street; her health was not good. I told her I did not know, but I would ask. I came along

by there one day after this took place, not long after I had talked with Mr. Kenyon, and I came across Mr. Kenyon again. He was standing in front of the house. He had just come down, as I thought, in a boat from the grounds. I asked him where Mr.
138 and Mrs. Sutton was, and he said they were in the house. I told him he probably could answer the question. I asked him if they were going to take possession of the place immediately or this next spring, and gave my reason. If so, and they were going to rent that house I wanted the first chance. Well, he said they were anxious, and he said Mrs. Sutton was anxious to take possession of the place as soon as possible, and that they would undoubtedly move there in the spring, as it was better for them, as they were making many improvements. As he said, we are making improvements this fall, building a barn, a boat-house, and fixing the other house so they could get possession as soon as possible, because it would be to their advantage and save them going back and forth in building the other house to be on the grounds, and raise their crops the next spring, and things like that. He answered about the house that he did not know whether they would rent it or sell it, but that at all events, if I wished so, he would state to them so if they did rent it, and we wished it we would have the first opportunity. That passed off in that shape. That was the fall of the purchase of the premises. So it passed along. When it come spring, it was—well, I don't know what time, the fore part of the season while they were at work some on the premises there—he said it was uncertain then. This talk was with Mr. Kenyon. I don't know whether he had spoken to Mrs. Sutton in the meantime or not.

Q. Did you have any other conversation with Mr. Kenyon?

A. It was along in the summer some time the next time I had any conversation with Mr. Kenyon. They were building the new house. It was a good ways under way. I was out boating up by the premises, but had not been on the ground during the time they
139 were building, and the house looked very large, larger to me than I supposed they were going to build. I was over to the island. I said to Mr. Kenyon, I remarked to Mr. Kenyon, he was building it, looked as though he was building a castle, a much larger house than I supposed he was going to build, from the distance. He said that the house was, they were building much larger than they intended on the start, or that he had planned, but as he was building it entirely for Mrs. Sutton, at her suggestion they had enlarged it, and he wished to please her in the matter, and have it as she directed, and that building the house was no bother or trouble to him. Mr. Sutton had the entire control of the building of the house, and he had authorized him to build it and finish it, and make the improvements exactly as Mrs. Sutton wished, and gave his reason—he gave her reason for wishing the alterations, that——

(Objected to.)

Q. State just what he said.

A. That afterwards, having room enough afterwards, he meant in future times, I suppose, they could, with the old house and the

premises, could, if they wished to, take summer boarders, make their living off the place, and he thought the idea remarkably good. That is the last conversation I ever had with Mr. Kenyon about it.

Q. You may state what you know, if anything, in relation to Mr. Sutton and Mrs. Sutton having possession of the property then, being in possession of the premises.

A. All the possession I know of was that they were there, as I have stated before. Mr. Kenyon said they were going to take possession immediately, to commence fixing the rooms ready to move into it the next spring. He spoke of their taking immediate
140 possession to build there, and be ready to move the next spring; that is why he thought I could have the house down here.

Cross-examined by Mr. JENKINS:

Q. What is your business?

A. Commercial traveler.

Q. For whom?

A. Austin, Nichols & Co.

Q. Where do they live?

A. New York.

Q. You have lived in Oconomowoc since 1868?

A. I think 1868 or 1869; I could not tell exactly.

Q. How long did you say you had known Mr. Kenyon?

A. I can't say whether Mr. Kenyon was here when I came here or came a few years afterwards, but I have met him. I think there has been no season since that I have not met him. I am out on the road part of the time. My home is here.

Q. What part of the time are you in Oconomowoc?

A. About half of the time; no regular time. I have no time for being away or here.

Q. What portion of the year are you traveling?

A. I claim to travel sometimes each month for the whole year, except in the very warm weather, July and August, I calculate to stay here most of the time. Sometimes during that time all the time, and in the extreme cold weather in the winter I am here. For the last three months I have not been out.

Q. How intimately did you know Mr. Kenyon?

A. Oh, I knew Mr. Kenyon as well probably—we have always been as social and pleasant together as any good neighbor, one neighbor would be with another.

Q. Whereabouts did you live in Oconomowoc with reference to where Mr. and Mrs. Sutton and Mr. Kenyon lived on Main street?

A. I lived on this street, Milwaukee street. I lived on this
141 street, up above the La Belle House, three blocks, on the corner here.

Q. And Mr. and Mrs. Sutton and Mr. Kenyon lived on Main street up toward the Draper House?

A. Yes, sir.

Q. How far from them did you live?

A. I don't know the distance—three blocks I should judge.

Q. Were you accustomed to visit them at their house?

A. Yes, sir.

Q. Did they visit at your house?

A. They have done so—yes, sir; in a neighborly way.

Q. What sort of a man was Mr. Kenyon; was he reticent, or did he talk about his affairs to all the people about town?

A. I do not think about any affairs of his own as a general thing he was very talkative; but he was a man that expressed his views on any subject that anybody would come to talk about freely, but he was not a man—that is, my idea is he would not be a man that would be going around forcing his ideas onto people, what you might call a talking man; I don't think he was that kind of a man.

Q. Was he a man that talked about his own business affairs, or his own business connections, even to intimate friends?

A. Not business he thought they had no business with. I think he would be about as the most of us would. I don't think he would volunteer to talk about business they had no question about, but if a man asked him any question about any business transaction that did not interfere with him or anybody else, I think he in a very gentlemanly way would talk very freely about it.

Q. I am asking about his habit of talking about his own affairs.

A. Generally, I don't think he would talk a great deal that way.

Q. Did you ever hear him talk about his own affairs?

142 A. Nothing, except in the case I spoke of where I commenced the subject.

Q. When was it you talked with him first about the Breck place?

A. It was in, I think, the fall of 1880; it was the first I had heard of it after it was reported here he had bought it.

Q. Do you know when it was?

A. I can tell you; yes, sir. I am satisfied it was in the year 1880.

Q. What enables you to fix that?

A. I judge it from the fact that that was the year that it was talked about a good deal, and one other reason is that a gentleman from Memphis was here and talked about buying the place, and, I supposed, was going to have it.

Q. How do you know it was 1880 the gentleman from Memphis was here?

A. I know it was in 1880, because I moved into this house in June of 1880; it was that season.

Q. From where did you move?

A. Here, in this other part of the town. The first of June of 1880 I moved into that house.

Q. What time in the fall was it?

A. It was not early in the fall, I know—it was along towards—if my memory serves me right—it was getting pretty near cold weather before they got to work on this place. It was after they had commenced work on that place in the fall of 1880 this first conversation took place.

Q. The first conversation he did not commence; the first conversation I am talking about?

A. No, sir; it was in the fall——

Q. I ask what time in the fall?
A. I cannot tell.
Q. Give me what month it was.
A. My impression is, it was in October.
Q. Before or after the presidential election of that year? Can you judge it by that?
A. My idea is it was before, because I know it was not cold.
143 Q. How long before, have you any idea?
A. No; as near as I can answer the question it would be some time in October.
Q. It was not cold weather?
A. At the time I know I had no overcoat on; I was walking in the street, and I know it was not cold.
Q. Don't you usually wear an overcoat in October?
A. If it is cold I do; if warm I do not.
Q. Where did you say he was going?
A. From the Breck place down, walking down, further back down town.
Q. Where were you?
A. I came out of my house.
Q. As he came down?
A. Yes, sir.
Q. Will you state just what that conversation was, giving me his exact language if you can, without any amplification at all?
A. I have given it as nearly as I can. I can give it over again.
Q. Give that exact conversation, and give it as nearly in the order of it as you can.
A. I said to him, I asked him if he had bought the place, the Breck place; I had heard he had, the farm as I called it, asked him if he had bought that. He said he had. I told him I was very glad to hear he had bought it, because I thought it looked like his becoming a permanent resident. He said he had bought it, but had not bought it for himself; he had bought it for Mrs. Sutton, and they would make it a permanent residence, and he should make it his home with them whenever he was here, as he had—he mentioned about the number of years, I can't remember, but for many years he had made it his home with them. I asked him if he felt anything like a granger, in a laughing way, and he answered it in the same way, as before he had answered it as saying it was not
144 for himself, but for Mrs. Sutton, and that the place was large enough—as to his having a farm—and sufficient to keep a horse and cow and raise vegetables more than any one family could use. Another reason for getting it for them, it would be a benefit for Mr. Sutton, as he needed more outdoor exercise, which he would have in taking care of the place and raising the vegetables, and taking charge of the place, and, furthermore, while he was with them he could help Mr. Sutton in this farming, this outdoor work, as his physician—he did not say what physician—had said he must have more outdoor exercise.
Q. Was that the whole conversation as you remember it?
A. I don't think of anything else at that time.

Q. Did he say he had bought it for Mr. and Mrs. Sutton or for Mrs. Sutton?

A. For Mrs. Sutton.

Q. You say that do you?

A. Yes, sir.

Q. Did he say the property had been deeded to Mrs. Sutton?

A. There was no mention made of anything of that kind.

Q. What was the exact expression he used in that connection?

A. That he had bought it for Mrs. Sutton.

Q. That he had bought it for Mrs. Sutton?

A. Yes, sir.

Q. He did not say to whom the deed was taken?

A. No, sir.

Q. But you understood he had bought it?

A. I understood he had bought it for Mrs. Sutton from his saying that I supposed she had the deed. Before that I heard Mr. Kenyon had bought it.

Q. You asked him if he had bought the place; he said, yes; he had; he had bought it for Mrs. Sutton?

A. Yes, sir; that was in answer to my saying I was glad he had become a permanent resident here.

145 Q. Then, at this second conversation—which was how long after the first one?

A. Well, it was not a great while; I can't tell; but it was after we had a little talk, my wife and I. She was anxious I should see him——

Q. As to the time?

A. It was not long.

Q. What was it he said when you asked him if the old place would be for rent?

A. He said—I asked him if the old place would be for rent, and he said that they were anxious to get onto the other place, to get possession of the other place, as soon as possible; that they were going right to work, he said, making improvements over there, so that they could move there the next spring; that they intended to build still another house there the next season and make various improvements, and gave that as a reason they were anxious to get over there in the spring; it would be easier for them to be on the ground than to have to go backwards and forwards, and, if they did it, that they would either sell this place or rent it. He spoke as though he had not talked with them about it, which I don't know.

Q. This is, now, the language he used, as nearly as you can recollect it.

A. Yes, sir; as nearly as I can recollect it.

Q. This last conversation—can you tell me about when that was?

A. I should think—I could not tell you within a month of the time. My idea is it was along—I should think about the fore part of September. At the same time I could not tell the time.

Q. What sort of weather was it at that time?

A. It was very nice. We were out sailing. It was very nice weather.

Q. Warm?

A. Yes, sir.

Q. How far had the house progressed at that time?

146 A. The frame was up, so at the distance I was from it you could see it looked like a building, although it was not covered. They had got it up so you could see the shape of the house. It looked like a large house.

Q. You were out sailing?

A. Yes, sir.

Q. Where did you see Mr. Kenyon?

A. In front of the Main-street house.

Q. As you came in from sailing?

A. It was later. This was pretty near evening when I saw him. I was very often up to Draper Hall. It was when I was passing, going to my home.

Q. I understood you had been out sailing?

A. I had that afternoon. It was after I had returned.

Q. Will you be kind enough to tell me how long that conversation lasted?

A. I don't know. He was on one side of the fence, I on the other. We might have talked about some other business or people; I don't know about that; but it was not a great while.

Q. It was a casual street talk?

A. I made the remark to him he was building a very much larger house——

Q. I was only trying to get at the time.

A. We were neither of us in a particular hurry, but it was not a great length of time.

Q. Just a short conversation?

A. Yes, sir.

Q. Be kind enough to give me that conversation, as nearly as you can recollect it, in the order it took place, and — nearly as you can state it in the language of Mr. Kenyon.

A. I will, sir. As I said, I made the remark to Mr. Kenyon that as I was out sailing I had seen his house up there, and to me it appeared a very much larger house than I supposed he was going to build; and his answer was it was a larger house than he at first planned to build, but, as he was building it entirely for Mrs. Sutton, they had altered the plans—as they were building it entirely for Mrs.

147 Sutton; she had made plans that made a larger house of it; that he had no trouble, nor was not bothered about the premises, in that he had authorized Mr. Sutton to make any changes and make any improvements that Mrs. Sutton wished made, and this was—the enlargement of the house was according to her suggestion, and then gave the reason why they did enlarge it, that it would be large enough when the improvements were completed up there, as it was to be their permanent home; the improvements made it large enough so that in the future, if they wished, they could make their living on the place from taking summer boarders, and he thought the improvement was a good one—Mrs. Sutton's idea; he always expressed it as Mrs. Sutton to me.

Q. Do you remember of anything else you talked of in that conversation?

A. We talked about sailing; he was fond of sailing, and the rest of us were.

Q. Did you talk about sailing that day?

A. I told him I had been sailing, and told him——

Q. Did you talk to him on any other subject than you have stated here?

A. Not a great deal.

Q. Did he talk on any other subject?

A. No, sir; no particular subject; because it came from the remark I made to him about enlarging his house.

Q. What did you talk about in that conversation?

A. Nothing more, I presume, than it was nice sailing.

Q. Do you recollect of anything?

A. Something about a nice sail.

Q. Did you say to him you had a nice sail?

A. I don't know.

Q. Do you remember of any other subject you spoke to him upon on that occasion?

A. We had not any conversation to amount to anything beside that.

Q. Did he speak at that time on any other subject?

A. No particular subject.

Q. On any subject, whether particular or not?

148 A. At that time I don't think he did. I think after that I went on home.

Q. Where did he go?

A. I left him there in the yard.

Q. How were those conversations impressed upon your memory?

A. They were impressed upon my memory because I was anxious to get the house there at that time—this house down town.

Q. This last conversation took place in the fall of 1881?

A. Yes, sir; we still talked of getting the house when they moved.

Q. But the conversation when you expected to get the house was in the fall of 1880?

A. The first one; that was what led to having the conversation at all.

Q. They did not go over there to live, the Suttons, until after Mr. Kenyon died, did they?

A. I don't know that; they were always there to work.

Q. Did they go over there to live until after Mr. Kenyon's death?

A. I think not.

Q. Do you know whether they went on to that new place before or after Mr. Kenyon died?

A. It was after.

Q. When was it they went over there to live?

A. Spring of 1882.

Q. What time in the spring was it?

A. I think in April, though I don't know.

Q. Did you get the old house after all?

A. No, sir.

Q. This matter as to whether this property should go to Mr. and Mrs. Sutton or not has been a matter of a good deal of conversation here in Oconomowoc?

A. I don't know; I never heard it mentioned, only by a very few people; still it may be.

Q. By whom, for instance; who have you talked with?

A. I have heard—well, I have heard, I can't say—I have heard A. J. Rockwell speak of it, and some parties up at Draper Hall once or twice speak of it.

149 Q. Have you talked with Mr. and Mrs. Sutton yourself about it?

A. No particular amount; I suppose the principal thing was saying I was sorry that they had to have a litigation, that it was not settled up as I had supposed, although as I took it, as anybody would, when a man said he had bought a place for another party, that Mrs. Sutton had it, until after the death I suppose they did have it.

Q. When did you first find out they did not?

A. The first that I knew they did not was in Mr. Peck's office in Chicago; I was down there in the winter some time, and Walter Peck says, "I have just got a letter from Mr. Sutton that Mr. Kenyon is dead." This was a social letter of his, and he just read something in that speaking of Mr. Kenyon's death, and he mentioned in some way—how it was expressed I don't know exactly, but I saw there was trouble about the title of the lot here, these premises; that is the first I suppose I ever had heard anybody mention anything about it; I took it from Mr. Kenyon's expression that she had the title; I don't know that I had any right to make the supposition, but it struck me that way, and that is the first I knew it was not so.

CELESTIA EDWARDS, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. Oconomowoc.

Q. How long have you resided here?

A. Since the spring of 1865.

Q. Are you acquainted with the parties to this suit?

A. I was acquainted with Mr. Kenyon, and I am acquainted with Mr. and Mrs. Sutton; I am not acquainted with the other parties.

Q. How long have you been acquainted with the par-
150 ties you are acquainted with?

A. Since they first came here; I think it was in the spring of 1872.

Q. Are you acquainted with this property that is in dispute in this action?

A. I have been there a good many times, and was there before they bought it a good many times.

Q. Before they bought it it was known as the Breck property.

A. Yes, sir.

Q. Since then has it any particular name?

A. I have known them call it "The Oaks."

Q. I will ask you to state whether you had any conversation with

Mr. Kenyon in his lifetime in relation to why he bought it, and his object in buying it and in building there?

A. No, I think I never had any such conversation with Mr. Kenyon about it; in fact, I do not remember distinctly but one occasion on which he spoke to me particularly in regard to his designs with the place.

Q. You may repeat that?

A. It was in the fall; I think it was the last time that I was over there before they went East; we were looking at the house—I did not go inside—from the outside, and he called our attention to the Queen Ann window, and we went further into the grounds to get the effect of the house from another point of view; we spoke about the grounds and about the drive, and he said he believed Sortie had some further improvements in view that would be brought about when the time came, when they got around to it; I remarked when they got it all finished they would have a very beautiful place and home there; he said he liked it very well, but it did not make any difference to him; it was all theirs, it was the children's; they were fixing it up just to suit themselves.

Q. What further was said, if anything?

A. Nothing further in relation to that.

151 Q. Were you on the grounds very often?

A. Probably nearly every week during the summer.

Q. Who had the supervision of the grounds and the control of them apparently?

A. Mr. Sutton.

Q. State, will you, what you know, if anything, in relation to who had the keys of the building?

A. I don't remember anything about the keys. I went through the old house after it was moved with Mr. Kenyon; he showed us around through the house; the doors were not locked.

Q. That is all you know about the matter?

A. That is all I would like to swear to particularly from my own knowledge. Of course I heard a good deal of talk and heard a good many conversations, not from Mr. Kenyon, in his presence a good many times, but I don't think of anything I would like to undertake to give the exact conversation. I have only general impressions left, and I suppose they are not good for anything in a lawsuit.

Q. Do you remember any conversation in which he was present in which this matter was talked over?

A. I cannot remember that I heard him say distinctly himself what his plans and object was in buying the place except that once. That is why I remember so distinctly. I had heard others say the same thing, but it is the only time I can remember his saying distinctly that it belonged to them.

Cross-examined by Mr. JENKINS:

Q. In giving the conversation which you had with Mr. Kenyon at this place in the fall of 1881—the fall just before they went East

for the last time—have you given as nearly as you can the exact language?

A. I think it was his exact language.

152 Q. Did you give us in your direct examination the whole of that conversation as you remember it?

A. The whole that was of any importance.

Q. I mean the whole in reference to this matter?

A. I think I did. I do not remember there was anything more said.

O. P. ANDRUS, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. Oconomowoc.

Q. How long have you resided here?

A. About 30 years.

Q. What is your profession or business?

A. Carpenter and joiner.

Q. Were you acquainted with Mr. Kenyon in his lifetime?

A. Yes, sir; while he was here in Oconomowoc.

Q. Are you also acquainted with the plaintiff and her husband?

A. Yes, sir.

Q. Do you know this property in dispute called the Breck property?

A. Yes, sir.

Q. I will ask you to state if Mr. Kenyon called upon you at any time in relation to arranging for the building of or removing a building, or making any improvements on that property?

A. Yes, sir; he did.

Q. Can you state about what time it was?

A. I think about the—somewheres about the 10th of October, 1880.

Q. You may repeat the conversation you had with him at that time.

A. I met Mr. Kenyon on the street near the post office, and he asked me if I would come over to Mr. Sutton's house on Milwaukee street and assist them in making out a plan; that is, fixing a plan for a house on the property.

Q. Are you not mistaken about the street?

153 A. Main street I mean. I told him I would go over. I think I set the time to go the next day. I was pretty busy. I went over the next day and found Mr. Kenyon in the parlor; I think I knocked at the door; he came to the door; we went into the parlor; he showed me the sketches he had made out himself, a few designs, but he hadn't settled on any; he thought I might help him to get something up to show to an architect, to give the architect some idea of what he wanted. We talked about the plans; he showed me the different plans he had made; he called Mrs. Sutton in from the kitchen, I think, or some other room, and she also talked about the plan, and she said that she wanted a bay window in if I could see a place to get one on and have it look nicely; I said I thought I could on the southwest corner, that is southwest front, and she also wanted

some corner closets in the rooms below, I think, and then I asked him what style he would like the roof, what style of a house he wanted, what appearance, and he said he didn't know; he had not decided on that yet; if I could go up stairs with him he would show me a photograph of a house he built in Brooklyn. We went up stairs, Mr. Kenyon and myself alone, and while we were up there he decided on a mansard roof on his new house; that I might draw one, and we would see how it would look. As I got nearly ready to start I asked him what style of a bay window he wanted; he said he didn't care anything about the bay window what it was; he said I could build it to suit Mrs. Sutton; he was building it for her, and he wanted her suited with the house. So I went down stairs and came out.

Q. Anything further; any other conversation you had with him in relation to it?

A. I met him after I took the plans back to him—I took the plans back after I got them finished. He said he would look them over. He didn't say whether they suited him or whether he
154 would build after them or not, but he went away to New York, I think, pretty soon after. I don't think I saw him again before he went to New York. And the next summer, 1881, I had considerable conversation with him about his building; he wanted me to build it, but I was busy; I had more work than I could attend to, consequently I didn't get the job; I didn't do his job; but I met him on the train going to Milwaukee—I went to Milwaukee with him—and he said he had got his plans nearly all ready, and that he was going to give it over to Mr. Sutton as soon as he got them finished; he didn't care to have anything more to do with it himself.

Mr. JENKINS: Give what?

A. The plans. He was going to New York himself. That was the last.

Cross-examined by Mr. JENKINS:

Q. Did he tell you who in Milwaukee was making the plans?

A. Yes, sir; Koch.

Q. When you got in the upper room in the house he there decided upon having a mansard roof?

A. Yes, sir; he said I could draw one; he would see how it would look; he didn't decide to have it.

Q. And as you got ready to start you asked him how you should construct that bay window; he said that as to that he didn't care; to build it to suit Mrs. Sutton?

A. I did give all I said about the bay window. I asked him whether it would be a five-sided, three-sided, or square window. He said he didn't care; anything that would suit Mrs. Sutton it would be all right.

Q. She was the one who suggested the bay window?

A. Yes, sir.

Q. That was all he said on that subject?

A. Yes, sir.

155 Plaintiff's counsel introduces in evidence the will of John S. Kenyon, dated the 28th day of February, 1879, and proven before the surrogate of the county of New York on the 10th day of February, 1882, duly exemplified and recorded in Waukesha county, copy of which is hereto annexed, marked "Plaintiff's Exhibit B," and to be treated in all respects as if it were the original.

Taking of testimony held open to be resumed on stipulation or notice.

PLAINTIFF'S EXHIBIT A.

Be it remembered that on this 2d day of September, 1881, it is agreed by and between C. T. Sutton, of Oconomowoc city, and Jacob Weltner, of the same place, in manner and form following, viz.:

The said Jacob Weltner, for the daily consideration hereinafter mentioned, doth for himself promise and agree to and with the said C. T. Sutton that he, the said Jacob Weltner, shall and will within the space of — months after date hereof, in good and workmanlike manner, and according to the best of his art and skill, at Oconomowoc, on the property known as The Oaks, well and substantially erect, build, and set up one house according to the draft and specifications furnished and orders given by the said C. T. Sutton, and compose the same out of the material that the said C. T. Sutton shall furnish and provide for the same, he to provide all material necessary for the making and building said house; said Weltner is to engage all help and superintend their daily work.

In consideration whereof the said C. T. Sutton doth for himself promise and agree to and with the said Jacob Weltner well and truly to pay, or cause to be paid, unto the said Jacob Weltner,
156 the sum of three dollars per day, of ten hours each, for all time actually spent in discharge of said duty of building and superintending the building of said house.

And all shall be done under the general orders and oversight of said Sutton, and the said Sutton reserves to himself the right, if at any time the said Weltner neglects to attend to his duties and absent himself from the charge and oversight and superintendence of his men, or withdraw his workmen to the detriment of said Sutton, to discharge said Weltner and his men if he so desire and employ other workmen in their stead. And for all service that may have been rendered previous to said discharge, if any, the said Sutton shall pay or cause to be paid the said Weltner the price per day as heretofore in this agreement set forth.

And for the performance of all and every the articles and agreement above mentioned the said C. T. Sutton and Jacob Weltner do hereby bind themselves, their executors, &c., each to the other in the sum of one hundred dollars firmly by these presents.

In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written.

CHAS. T. SUTTON. [SEAL.]
JACOB WELTNER. [SEAL.]

Sealed and delivered in presence of—
LOUISE C. WILLIAMS.
(Exhibit A.)

PLAINTIFF'S EXHIBIT B.

In the name of God, amen.

I, John S. Kenyon, of Harlem, in the twelfth ward of the city of New York and State of New York, being of sound and disposing mind and memory, and being desirous of disposing of my
157 worldly estate after my decease, do make and publish this my last will and testament in manner following, to wit:

First. I direct all my just debts and funeral expenses to be paid by my executors hereinafter named as soon after my decease as shall be convenient and proper.

Second. I give and bequeath to my nephew, Harry Moore, son of my brother-in-law, William H. Moore, of Ludlowville, State of New York, my gold watch and the chain attached thereto.

Third. I give and bequeath to the "Colored Home for the Aged and Indigent," located at the foot of East Sixty-fifth street, in the city of New York, all my clothing and wearing apparel of which I may be possessed in the city of New York at the time of my decease.

Fourth. I give and bequeath to Sarah S. Sutton, wife of Charles T. Sutton, of Oconomowoc, Wisconsin, all my personal property of whatever nature and kind that may be or remain in her house at Oconomowoc aforesaid at the time of my decease, except my jewelry.

Fifth. I give and bequeath to my sisters, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, wife of Charles H. Clark, of Colchester, State of Connecticut, and Caroline B. Brown, wife of Erastus F. Brown, of New York city, all my jewelry, diamonds, furniture, beds, bedding, linen, silver and plated ware, and all articles of household use not hereinbefore disposed of, to be divided between them in equal portions, share and share alike, in such manner as they may elect.

Sixth. I give, devise, and bequeath all the rest, residue, and remainder of my estate, both real and personal, to my executors hereinafter named in trust.

158 To sell and dispose of all my real estate within ten yaers after my decease, either at public or private sale, and on such terms and in such manner as my said trustees shall deem and determine to be for the best interest of my estate.

To sell and convert into cash all my personal property of every name, nature, and kind whatsoever not hereinbefore disposed of, except such portions thereof as may be already invested on bond and mortgage, on real estate, or in good stock or bond securities, and which my said executors may deem to be safely invested, and to invest all moneys accruing from the sale of my real and personal estate on bond and mortgage, on real estate, or in securities of the United States.

To set apart the sum of twenty thousand dollars in securities, and pay the interest and income arising therefrom as follows:

To my sister, Maria S. Kenyon, the one equal fourth part thereof,

in semi-annual payments, on the first day of January and July, for and during her natural life.

To my sister, Elizabeth B. Kenyon, the one equal fourth part thereof, in semi-annual payments, on the first day of January and July, for and during her natural life.

To my sister, Abigail P. Clark, wife of Charles H. Clark, of Colchester, State of Connecticut, the one equal fourth part thereof, in semi-annual payments on the first day of January and July, for and during her natural life.

To my sister, Caroline P. Brown, wife of Erastus F. Brown, of the city of New York, the one equal fourth part thereof, in semi-
159 annual payments on the first day of January and July, for and during her natural life.

Upon the death of either of my said sisters I will and direct that the one-fourth part of the said securities hereinbefore directed to be set apart be and form a part of my residuary estate, to be disposed of by my executors as hereinbefore directed.

To set apart the further sum of ten thousand eight hundred dollars, in securities, and pay the interest and income arising therefrom as follows, viz:

To my sister-in-law, Cordelia W. Moore, the one equal third part thereof in semi-annual payments, on the first day of April and October, for and during her natural life.

To my sister-in-law, Julia W. Moore, wife of William H. Moore, of Ludlowville, State of New York, the one equal third part thereof, in semi-annual payments, on the first day of April and October, for and during her natural life.

To Sarah S. Sutton, wife of Charles T. Sutton, of Oconomowoc, State of Wisconsin, the one equal third part thereof, in semi-annual payments, on the first day of April and October, for and during her natural life.

Upon the death of either of the above-named annuitants, I will and direct that the one-third part of such securities lastly above directed to be set apart be and form a part of my residuary estate, to be disposed of by my executors as hereinafter directed.

And to pay over all the remaining net interest and income of my estate, in semi-annal payments, on the first day of January
160 and July, until the principal of my estate shall be distributed by my executors, as hereinafter provided, to my residuary devisees and legatees hereinafter named in equal portions, share and share alike.

And upon the further trust, to distribute and pay over within ten years after my decease, in equal portions, all the rest, residue, and remainder of my estate, and of the securities forming a part of my residuary estate, not hereinbefore disposed of or directed to be set apart for the benefit of the annuitants hereinbefore named; and also the proceeds arising from the sale of my real estate, and all income or interest arising from or growing out of my estate not hereinbefore disposed of, to the fifteen societies or associations hereinafter named, my residuary devisees and legatees, to whom I give and bequeath the same, share and share alike, viz:

To the treasurer of the "Association for Improving the Condition of the Poor," organized in the year 1842 and incorporated in the year 1848, to be applied to the charitable uses and purposes of said association.

To the "American Board of Commissioners for Foreign Missions;" to the "American Seaman's Friend Society," incorporated by the Legislature of the State of New York, to be applied to the charitable uses and purposes of said society.

To the "Children's Aid Society," incorporated in the year 1855 under the laws of the State of New York, to be applied to the charitable uses and purposes of said society.

To the "New York City Missions and Tract Society," instituted in the city of New York, and incorporated by the Legislature
161 of the State of New York, to be applied to the charitable uses and purposes of said society.

To the "American Bible Society," formed in New York city in the year 1816, for the charitable uses and purposes of said society.

To the "Trustees of the Board of Education of the Presbyterian Church in the United States of America," William Mann, No. 907 Arch street, Philadelphia, Pa., secretary.

To the "Home for the Homeless," in the city of Utica, State of New York, for the charitable uses and purposes of said society.

To the "Association for the Relief of Respectable Aged Indigent Females in the City of New York," to be paid to the treasurer for the time being, for the uses and purposes of said association.

To the "Presbyterian Home for Aged Women," home building in East Seventy-fifth street, in the city of New York, for the charitable uses and purposes of said society.

To the "Harlem Presbyterian Church," on One Hundred and Twenty-fifth street, between Madison and Fifth avenues, in the city of New York.

To the "First Presbyterian Church of Tremont, in the city of New York."

To the "Harlem Library," on Third avenue, between One Hundred and Twenty-first and One Hundred and Twenty-second street, in the city of New York.

To the "Young Men's Christian Association," corner of Fourth avenue and Thirty-third street, in the city of New York.

162 To the "Board of Home Missions of the Presbyterian Church in the United States of America," to be expended for the appropriate objects of said corporation.

It being my will that whenever any part or portion of the money hereinbefore directed to be invested for the annitants hereinbefore named shall become a part of my residuary estate as hereinbefore provided, that then, and in such case, said moneys shall be divided equally between said societies or associations to whom I give and bequeath the same.

And lastly, I hereby nominate, constitute, and appoint my brother-in-law, Erastus F. Brown, and my nephew, Francis A. Kenyon, to be the executors of this my last will and testament, and also trustees

for the trusts herein contained, hereby revoking all former and other wills by me made.

In witness whereof I have hereunto set my hand and seal this 28th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

JOHN S. KENYON. [L. S.]

The foregoing instrument was on the day of the date thereof signed, sealed, published, and declared by the said testator, John S. Kenyon, as and for his last will and testament, in our presence, and we at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

THOS. B. TAPPEN, 348 E. 120 St.
SAM'L B. GOODENOUGH, 200 E. 124 St.
THOMAS R. EBERT, 211 E. 124 St.

(Exhibit B.) Admitted to probate in Surrogate court, county of New York, State of New York, February 10th, 1882.

163 (Title of the cause.)

OCONOMOWOC, *April 30th*, 1885—9.30 a. m.

Taking of testimony resumed pursuant to adjournment.

Present: Hon. Edwin Hurlbut, for the plaintiff; J. G. Jenkins, Esq., for defendants.

JACOB VAN HORN, recalled by plaintiff, testified:

Q. I will ask you if you have computed what it would cost to finish the plastering and mason work on that building?

A. Yes, sir.

Q. You may go on and state.

(Objected to as irrelevant and immaterial.)

A. It will cost $400.00 to do the plastering and finish up all the mason work. There is some work to be done in the areas, and a stone wall; $400 will cover the whole of it.

Q. You are a practical mechanic, are you, mason and plasterer?

A. Yes, sir.

Q. I believe you testified that was your business?

A. Yes, sir; that is my business; taking contracts and doing mason work, plastering.

(Cross-examination waived.)

JACOB WELTNER, being recalled by plaintiff, testified:

Q. You testified you were the builder of the building on "The Oaks," the Breck place?

A. Yes, sir.

Q. You constructed it thus far as the boss machine?

A. Yes, sir.

Q. Have you examined it, with the cost it will be to complete it?

A. Yes, sir.

Q. You may state what it will cost.

(Objected to as irrelevant and immaterial.)

164 A. I went through it and counted the openings in the building, both doors and windows; that is the only way; counted the openings; that is, as to the outside being finished; the siding is all in, but the finishing, the doors, sash and, frames—and it will take to finish the house, as it was intended to be finished, according to the plans and specifications, $15 an opening. I have not the amount with me. I counted the amount and gave it to Mr. Sutton; I gave him a list; he has got it now with him.

Q. I want you to testify; I don't want the figures to testify.

Mr. JENKINS: Do you know how many openings there are?

A. I counted the openings myself, and made my estimate, and I had no paper with me, only my little book; he had a paper, and I put it right on and signed my name to it—I don't know whether I signed my name, but he has the paper. We counted it all over. I left it with him. We allowed $15 an opening, and then $400 for all labor—that is, $15 an opening for windows and doors, and five dollars a running foot for the veranda. Then we allowed $400 for all extra labor outside of those openings, finishing the stairway, and also other work—laying the floor. The first floor is to be laid in hard wood all over. About $400 for labor, besides those openings, five dollars a foot for the veranda. You can't build the veranda for a cent less than five dollars a foot, the way the specifications call for. We counted the number of feet in the veranda, and put it at $5 a foot. That is the best way to get at it.

Q. Did you figure up so you could state the proximate amount?

A. Yes, sir.

165 Q. Of doing all the work and furnishing materials to build and finish the building according to the plans and specifications?

A. Yes, sir.

Q. State what it is.

(Same objection.)

A. I stated we counted the openings, $15 an opening for all the windows——

Q. I did not know but that you had the gross amount.

A. No, sir; I had it down, but I didn't take it with me; I left it with Mr. Sutton. The roof is not finished; we have to go all over the roof, put the rigging on that the plans call for; I took an estimate all through, it will be about $400 besides the openings—finishing the closets, all of them, laying the floor.

Q. Is this $400 labor and material?

A. This $400 is for the labor on laying this hard-wood floor on the first floor all through; I mean for labor only; that is, finishing the first floor, finishing the closets—all the closets—and finishing the roof. That is what this labor is for. The $15 includes the glass, sash, weights, cords, and all the trimmings that belong to the frame;

includes doors, locks, hinges, everything just complete; $15 an opening completes every opening, labor and all, and material.

Q. Then is the veranda separate?

A. Yes, sir; that is not included.

Mr. JENKINS: That $400 does not include the material?

A. No, sir.

Mr. JENKINS: Does not include the material on anything, does it?

A. No, sir; $400 for labor outside of these openings.

Q. It don't include any material?

A. It includes some material in the closets. I think there are some eight or ten closets on the first floor—there are six or seven.

166 The hard wood we figured, it takes so many feet, at $80 a thousand for the first floor: the building is 42 by 38; I figured it up; it takes so many feet at $80 a thousand. This $400 includes the labor and the nails for the laying of the floor and finishing the closets, and the balance of the work on the roof. I went all over carefully and estimated what it would cost to finish that building. The only way to get at it as it is now is to count the openings.

Q. You may go on and state just how you made your estimate, and what the figures were for each item to finish up that building—the carpenter work and materials.

A. It is right in this paper.

(Paper produced.)

Q. I want you to swear from your own recollection what it is worth to finish up this job?

A. $3,825.00.

Q. It will cost that to complete it, materials and labor?

A. Yes, sir.

Q. In doing the carpenter and joiner work?

A. Yes, sir.

Cross-examined:

Q. Did you make a detailed estimate of the cost?

A. Yes, sir.

Q. And this is the estimate you made?

(Shows witness the paper.)

A. Yes, sir: that is the estimate I made.

"*Estimate of Jacob Weltner.*"

127 openings, windows, and doors, complete, at $15 per opening	$1,905 00
197 feet piazza, complete, at $5 per foot	985 00
2,000 feet hard-wood floor	160 00
Banister and stair-rail, complete	75 00
Mantles and grates, complete	200 00
167 For extra labor and material	400 00
To complete roof	100 00
	$3,825 00

WITNESS: The item for labor entire also includes base boards, nails, etc.

Q. Was any contract awarded you to do this work?
A. No, sir.
Q. Or any promise given to you?
A. No, sir.
Q. How did you come to make this estimate?
A. I was asked by Mr. Sutton to see how much it would cost to complete the building as I had commenced it. He wanted me to see how much it would cost to complete the building.

Re-examined:

Q. This is what it will honestly cost to complete and perfect the building?
A. Yes, sir; it is not any too much, either. I took a close estimate on it so they could not find any fault with it.

A. SIMONS, called by plaintiff, being sworn testified:

Q. Where do you reside?
A. At Oconomowoc.
Q. How long have you resided here?
A. 16 years.
Q. What is your business?
A. Painter.
Q. Painter by trade?
A. Yes, sir.
Q. Are you acquainted with the building that is in dispute? You have examined the building on the place called "The Oaks," have you not?
A. I have.
Q. It is the old Breck place in the city of Oconomowoc?
A. Yes, sir.
Q. It is partly finished, is it not?
A. Partly finished.
Q. Have you examined it to see what it would cost to do the painting on the building; finish it up according to the plans and specifications?
A. Yes, sir.
168 Q. You may state what it is worth to finish it—what it would cost to finish it, furnishing the materials and labor?

Objected to.

A. $775.00.

Cross-examined:

Q. Is that the outside painting?
A. Yes, sir.
Q. Not inside at all?
A. And inside.
Q. It does not include frescoing?
A. No, sir.

Q. Just the ordinary painting?
A. Yes, sir.
Q. By what plans and specifications were you guided in making that estimate?
A. We estimated the wood-work, inside and outside.
Q. What plans and specifications did you have?
A. We had Mr. Sutton's plan there; the plan of the house.
Q. Did you estimate it with reference to doing the work?
A. Doing the work.
Q. Did you make a contract to do it?
A. No, sir; not yet.
Q. Did you estimate it for the purpose of making a contract.
A. Of making a contract.
Q. Was the contract awarded to you?
A. It is promised to us if they get it, that is all.

Re-examined:

Q. You said Mr. Sutton's plan—what do you mean?
A. The plan he got over there for the house.
Q. The plan for the building and construction of the house?
A. Yes, sir.
Q. The one by which the building has been constructed thus far?
A. Yes, sir. He got a plan over there; we saw the plan of the house over there; the way everything was to be.
Q. The way it was to be finished?
A. Yes, sir.

169 Recross-examined:

Q. Whose name was on that plan as the maker?
A. I could not swear to that.
Q. Did anybody else bid for that work besides yourself?
A. I don't know.
Q. How much profit is there in that bid?
A. I don't know that there is any profit.

Re-examined:

Q. How did you make your estimate? I mean how did you do it—what was the basis of the work, the labor and material separate? The labor so much, and the material so much?
A. We did not figure that at all; we figured so much a yard.
Q. That is the way painters work, so much per yard for the work?
A. Yes, sir.
Q. And furnish all material?
A. Yes, sir.
Q. Was that the usual customary price you put it in at?
A. Yes, sir.
Q. That is all you put it?
A. Yes, sir.

HUGO LORLEBERG, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. At Oconomowoc.
Q. What is your business?
A. General hardware business.
Q. Do you do such things as plumbing?
A. That is part of my business.
Q. I would ask you if you are acquainted with the parties to this suit?
A. Yes, sir.
Q. How long have you been acquainted with them?
A. I think since they have been here; it must be ten years anyway.
Q. You mean you are acquainted with Mr. and Mrs. Sutton,
170 and were acquainted with Mr. Kenyon in his lifetime?
A. Yes, sir; those are the ones that I am acquainted with.
Q. I would ask you if you are acquainted with the building known as The Oaks—the place which used to be known as the Breck property?
A. Yes, sir.
Q. You may state as to the fact whether you did any work on that building; and, if so, state what.
A. I done, I think, all the work that was done there in my line, plumbing and hardware.
Q. You furnished the hardware and done what plumbing there was done there?
A. Yes, sir.
Q. To what extent has the plumbing been done?
A. The pipes have been laid; that is all.
Q. I will ask you to state if you have made an estimate of what it will cost to finish the plumbing, and put in all the necessary steam apparatus?
A. Yes, sir.
Q. What will it cost to complete it?

Objected to.

A. Seven hundred and forty dollars.
Q. You have examined the plans and specifications to see just what there is to do on it?
A. Yes, sir.
Q. It will take $740 to complete it according to the plans and specifications?
A. Yes, sir.
Q. A part of which you have already done?
A. Yes, sir.
Q. No part of the $740, but a part of the plans and specifications? You have already done some work on it, and it will take $740 to finish it. That is correct, is it?
A. Yes, sir.

Cross-examined:

Q. What plans and specifications?

A. The plans and specifications, I believe, the house was built according to.

171 Q. The plumbing specified in those plans and specifications?

A. Yes, sir.

Q. Steam heaters and all?

A. Yes, sir.

Mrs. LOUISE C. WILLIAMS, recalled by plaintiff, testified:

Q. I would ask if you were particularly conversant with the state of health of the deceased, Mr. John S. Kenyon, while he was here in Oconomowoc, and the manner and way in which Mrs. Sutton attended him? If so, you may go on and state fully what you know about it.

A. I know he was a man subject to sick turns, and while a boarder at my brother's his room in the house was exactly opposite to hers; the doors were left open for communication, that she might hear anything if he was sick in the night, or in trouble. I also know that at all times, while they were living there, Mrs. Sutton was his constant attendant, even when he went fishing and hunting. If he went camping out Mrs. and Mr. Sutton always went with him. Also in the Main-street house the room communicated, his door opening directly out of her room, and was left open. I can also state that, when still living in the Main-street house, Mr. Sutton and Mrs. Sutton and Mr. Kenyon was expected to our house to spend the evening, and did not come. A day or two, I think, following, when I was at Mrs. Sutton's, Mr. Kenyon remarked that he had one of his sick turns, was not able to be out; therefore Sortie could not come. At the new house the rooms were also made to communicate.

Mr. JENKINS: You were only asked to state about his state of health.

Q. You may state where you derived this knowledge, and
172 the reason why it was so fixed; if you derived it from the deceased.

A. The knowledge of his ill-health, do you say, from him?

Q. I am talking about his having the rooms arranged in that new house.

A. From him; yes, sir; from him directly.

Q. State what he said about having it arranged in that way.

A. That the rooms should connect so that Mrs. Sutton could take charge of him; that she might hear and attend him when he was sick, if he was sick nights.

Q. If you had any conversation with him about his having her with him in order to take care of him in sickness, and—

Mr. JENKINS: Suppose you ask the witness what conversation it was.

Q. You may state all that you heard Mr. Kenyon say in relation to her taking care of him, and why he wished her to do so?

A. I am afraid I should keep you all day. I can state some

special times. In the spring, before they went to New York the last time, the winter that Mr. Kenyon died, on their return from New York, Mr. Kenyon said, in speaking of Mr. Sutton's illness, that it was not as well for Mr. Sutton he did not think in New York as in Oconomowoc; his health was not as good; but, he says, I am obliged to go to New York, and I do not think it prudent for me to go alone, and feel as if they must go with me. This conversation was in the spring of 1881. That was one special time.

Q. Go on and state any other time you can recollect, or any language or statements made by him.

A. I can't recollect any special times; there were many times I heard him speak of having ill turns, and know of his being confined to the house, unable to ride or go out, and Mrs. Sutton being his attendant.

173 Q. State any other time or any other expressions he made to you about the care he received from Mrs. Sutton.

A. At one time after the possession of The Oaks Mr. Kenyon was over there and showing me around the place; he said he hadn't been there for two days; that he had been sick; had not been able to be out, and they had progressed finely; the times have been often; I could not recollect every little thing.

Q. I would ask you to state if you remember any further about his having sick spells while boarding at your (brother's) house, and Mrs. Sutton, the plaintiff, taking care of him.

A. Yes, sir; I remember of being in the house in the evening, spending the evening, and Mr. Kenyon not being in the room during the evening, and Mrs. Sutton retiring several times into the hall, going up the stairs to listen to see if everything was well with him, and she remarked that Mr. Kenyon was sick; was not able to be out.

Q. At different times?

A. At different times.

Q. About how often was he sick, should you think?

A. I could not testify as to that.

Q. I mean as to the fact whether it was general while he lived there.

A. Yes, sir; during the whole term he staid there.

Q. About how long was he there?

A. I think about two years; I think they came there in 1872, and left there in 1874.

Q. You may state as to his general health, what you know from your own knowledge.

A. I am not an expert at all.

Q. I do not mean that.

A. I only know he was a man along in years, and was considered a delicate man.

Q. You say he was delicate; state what do you mean by that.

A. Subject to sick attacks.

Q. And about how often did these occur?

174 A. I could not say as to that, but I understood always he

was quite liable to them at most any moment, or most any day; in speaking of it himself he used to say, "My head."

Q. His head was affected?

A. Yes, sir.

Q. Do you think of anything further in relation to it?

A. I do not.

Q. Do you remember the circumstance of his being very sick for some little time in 1878?

A. I know at one time he was very sick, and I only know—I was not at the house—from the family, that he was very sick, and they hardly thought he would live.

The defendants move to strike the last answer out.

Q. You know nothing from your own knowledge?

A. No, sir; I was not at the house; I know nothing positively of my own knowledge.

Q. After his recovery did you have any conversation with him in relation to it?

A. I don't remember that I did.

Q. Do you know who his attendant physician was during his sickness?

A. I do; Dr. McL. Miller.

Q. Where does he reside?

A. Here in Oconomowoc.

Q. He was his attendant physician during the time he was here?

A. Yes, sir.

Q. Do you think of anything further in relation to his sickness?

A. I do not.

Cross-examined:

Q. How old a gentleman was Mr. Kenyon at the time of his death?

A. I don't know his age.

Q. In your judgment?

A. I should say he was upwards of 70 years old.

Q. How old a gentleman was Mr. Sutton at the time of Mr. Kenyon's death?

A. I don't know; I have not any idea of what Mr. Sutton's age is.

175 Q. You have no judgment?

A. I think I can guess it; I am something of a Yankee; 54 or 55, I should say.

Q. During the time that Mr. and Mrs. Sutton lived at your brother's did you live there, too?

A. I lived next house adjoining.

Q. And they lived at his house two years?

A. I think so.

Q. How often during that time was Mr. Kenyon ill?

A. I did not keep a memorandum of that.

Q. What was the matter with him?

A. I am not an expert; I could not say that.

Q. You do not know what the matter was with him?

A. I know he had sick attacks, and I always understood or supposed it was with his head.

Q. Headache?

A. I don't know what it was.

Q. Don't know whether it was neuralgia in the head or a cold in the head?

A. I don't think it was cold in the head.

Q. You don't know what it was?

A. I don't.

Q. Do you know how often he had those attacks?

A. His sick turns were quite frequent; I could not say.

Q. He spent the summers here, and went to New York in the fall, returning in the spring?

A. Not while he lived there.

Q. Did he go fishing?

A. Yes, sir.

Q. Out camping?

A. Sometimes.

Q. Out hunting?

A. He went out hunting when he was out camping.

Q. What else did he do around town?

A. I don't know as he was doing anything; walking down town.

Q. Drive out—walk around every day?

A. Not always.

Q. As a usual thing?

A. Yes, sir; when he was able to be out.

176 Q. What was the condition of Mr. Sutton's health?

A. He was a man in poor health; had a bad cough.

Q. How often did you see them after they moved to Main street in 1874?

A. It is hard telling. I should judge on an average three or four times a week.

Q. How often do you know of Mr. Kenyon's being confined to the house after 1874 down to the time of his death?

A. A great many times.

Q. And what did you understand was the matter with him from him?

A. I don't know. He always complained of "my poor weak head."

Q. He never told you what it was?

A. No; I don't think he knew.

Q. That is all he said—he had a poor, weak head?

A. Complained of his head.

Q. How often was Mr. Suttou confined to his house after 1874?

A. I don't know; not a very great many times, I don't think.

Q. His health was very delicate?

A. Yes, sir; he had a bad cough.

Q. Did Mr. Kenyon go down to New York in the summer, ever?

A. Oh, yes, sir.

Q. Alone?

A. Yes, sir; I think he did.
Q. Go down to New York in the winter months or fall months?
A. I think he did.
Q. Remain in New York all winter?
A. No, sir.
Q. When would he return?
A. I think he did not generally exceed three or four weeks in New York when he went down. He used to go twice a year.
Q. Did not Mr. and Mrs. Sutton accompany him two or three winters to New York and remain there all winter?
A. Yes, sir.
Q. He was about usually as other men are, was he not?
177 A. I don't know hardly what you mean by that. He was not confined to the bed all the time, or to the house.
Q. Usually he was about as other men, fishing, rowing, driving, &c.?
A. No, sir; not as other men, but as an invalid for his health.
Q. How was he an invalid?
A. Age may have made him an invalid in one respect.
Q. I am asking you in what respect he seemed an invalid.
A. That he was not strong, and able to take the wear and tear of life very much.
Q. There was not much necessity of his taking the wear and tear of life; he was not engaged in any business, and was a gentleman of property?
A. So I understood.
Q. There was no particular wear and tear of life, was there?
A. Not that I know of.
Q. What did you see him do during all these years? What have you seen him do around Oconomowoc?
A. Going out sailing and helping tack the boat.
Q. What else?
A. Going out riding with Mr. and Mrs. Sutton, and when they were building the new house he would pick up bits of board, and straighten up a plant or two in the garden—all sorts of fussing.
Q. Did you see him go to market here?
A. Yes, sir.
Q. Do about as any other gentleman would do that had no active business of his own, did not he?
A. Why, I suppose so.

Re-examined:

Q. You say Mr. Kenyon was a man about 70 years of age?
A. I think 70 or upwards.
Q. You judge from his appearance, I suppose?
A. Yes, sir.
178 Q. You never heard him say anything about his age?
A. No, sir; I do not know his age.
Q. I suppose you judge in the same way in relation to Mr. Sutton's age?

A. Yes, sir; I thought that was his age. May be if he were here I could look at him and judge better.

Q. You are not a judge of gentlemen's ages?

A. No, sir.

Q. How old should you judge Mr. Jenkins was from his appearance?

A. I would not dare to flatter the gentleman.

Recross-examined:

Q. Did not Mr. Kenyon frequently go alone to New York?

A. He did in the first years he came here.

Q. Did he not go alone to New York in the summer of 1881?

A. I cannot remember.

Q. Did not he go to New York alone in the summer of 1880?

A. I cannot tell.

Q. Did Mr. and Mrs. Sutton ever accompany him to New York in the summer time?

A. I cannot recall that they did.

Q. Was he not in the habit of going to New York every summer about July or August?

A. He was the first few years, but I don't know the latter years whether he did or not; I cannot testify. It seems to me—well, I cannot tell.

Dr. DANIEL MCL. MILLER, being sworn on behalf of plaintiff, testified:

Q. Where do you reside?

A. At Oconomowoc.

Q. What is your profession?

A. Physician.

Q. How long have you been practicing?

A. Since 1856.

Q. How long have you resided here in Oconomowoc?

A. Since the fall of 1865. I graduated at the College of
179 Physicians and Surgeons at the city of New York in the spring of 1856. I am a member of the State Medical Society of Wisconsin, and have been a member for some years.

Q. Were you acquainted with John S. Kenyon in his lifetime?

A. I was.

Q. How long were you acquainted with him?

A. I was acquainted with him in the city of New York and here in Oconomowoc ever since I can remember.

Q. You may state, if you please, as to the fact whether you were his attending physician; and, if so, when and where.

A. I commenced to be his attending physician when he came to Oconomowoc here—I have forgotten what year, perhaps 1871 or 1872. I continued to be his physician while he was in Oconomowoc, and many times when in New York he would send to me for prescriptions up to the fall of 1881, when he left here. He left here in November.

Q. The last time?

A. Yes, sir.

Q. He died when?

A. He was reported to have died in January or February, 1882, following.

Q. You may now state as to his general health.

A. He was an invalid. He was always sick. He was one of those men who suffered from dyspepsia, and greatly from neuralgia in the head. In the spring or fall of 1879, I think in the fall, he had an attack of apoplexy. That was in 1879; I have forgotten whether it was in the spring or fall; I think it was in September. It increased very much his head trouble; so he complained of pain and dizziness in the head constantly after that. The two years he was there after that his complaint was constantly in his head.

Q. You may state, if you please, what you know, if anything, in relation to the plaintiff's being his close and constant attendant, and having the care of him generally.

A. I know she did have.

180 Q. Go on and state what you do know.

A. I know the fact that while he was here she took all care of him, rendering to him all such services as were necessary.

Q. State as to how much those services were—that is, to what extent did she take care of him.

A. If I gave any directions I gave them to her, and looked to her for the performance of those services or the following of the directions. I saw nobody else, in fact. He never had any nurse, only these two, Charlie and Sortie.

Q. That is when you were called?

A. Yes, sir.

Q. How much or how often were you called during the time that he was here, if you can tell, about?

A. I don't recollect. My sister lived immediately opposite me, and I was over there a great deal of the time, over there very frequently; used to go over there evenings and be consulted by Mr. Kenyon. He used to come to my house very frequently. During this attack of apoplexy I, of course, attended him constantly during that time.

Q. How long was he confined to his room at that time?

A. I think two weeks.

Q. Do you remember when that was?

A. Either in the spring or fall of 1879; I have forgotten which, but I think it was in September.

Q. And I understood you — the plaintiff was his constant nurse and attendant?

A. Yes, sir.

Q. State, if you remember, Doctor, if at any time he was confined to his room for any particular length of time and the plaintiff was his constant nurse and attendant.

A. In 1873—it must have been 1873 or 1874 that he was in bed—many times he was in bed for a day or two; many times.

Q. State what you know, if anything, in relation to their having the rooms so arranged——

181 (Objected to as leading.)

Q. You may state what you know, if anything, in relation to their sleeping apartments being so arranged that she could be readily called at any time.

(Objected to.)

A. My directions to my sister were, after this attack of apoplexy, that she must keep constant watch of Mr. Kenyon, even at night; a repetition of the attack was certain to occur at some time, and she must watch for it.

Q. The plaintiff is your sister?

A. Yes, sir.

Q. Can you tell about how often he sent, when he was in New York, for prescriptions, and about when?

(Objected to.)

A. I do not know, sir; I do not recollect, but I should judge four or five times during a number of years. The last time he sent was in the winter of 1880. He was then suffering a great deal with dizziness in the head, and had been relieved by a prescription I gave him, and he wanted it renewed.

Q. You may state what you know, if anything, about the plaintiff's being with him when he went out, and the reason why she was with him.

A. One or the other was always with him; either Sortie or Charlie or somebody else. He never was permitted to go alone. *He never was permitted to go alone.*

Q. About the time that he had that attack; I think you said you thought it was in 1879?

A. Yes, sir.

Q. You are not certain as to the date?

A. I think it was either in the spring or fall of 1879.

Q. Do you think of anything else that you could state in relation to your treating him?

A. No; I don't think of anything else. I wrote a letter to Dr. Crocker once for him, stating his condition, and the treatment
182 he had been under here. Dr. Crocker was his physician in New York. That was, I think, just after this attack of apoplexy.

Q. About what was his age, should you think, from his appearance?

A. I should judge it was 75 or 76 years old, from his appearance. I do not know exactly his age; he was an old man when I was born; ever since I can recollect him.

Q. You may state if you ever had any conversation with him in relation to any contract between him and the plaintiff in relation to the Oaks.

A. No, sir; he never said anything to me about any contract that he had. He always spoke to me of the place as Sortie's, Sortie's place. He engaged my services once to try and induce Johnson to sell his place; I employed Johnson a good deal, and he thought I

might influence him. He said he wanted to purchase that to go with Sortie's place.

Q. That joined this place?

[A.] Yes, sir; right at the entrance. I advised him to wait. Johnson's idea was that he was going to buy it, and he could charge him a great price for it. He said: "You know, Doctor, I cannot wait; I have not got long to stay."

Q. What had he reference to when he said that?

A. His own death from apoplexy.

Q. You may state any further conversation in relation to his calling the place hers, or otherwise.

A. That is the only time I recollect. He always spoke of it as her place.

Q. State what you know, if anything, in relation to her taking possession of the place.

A. I am not a lawyer; I do not know what possession means; I do not know what constitutes possession; but I know this much, the day after the place was bought, I guess really before the papers were made out, they moved a lot of their things over there;
183 moved their boats, and went to work building a boat-house; went right to work on the place. I know they had furniture there. I know they had the keys.

Q. When you say "they" whom do you mean, the plaintiff and her husband?

A. Yes, sir; I know they had full direction; I know that they laid out all the work, that they saw that it was done, and all reference- were made to Sortie.

Q. That is the plaintiff?

A. The plaintiff; yes, sir.

Q. Do you know who built the boat-house?

A. Charlie built it himself, I guess; did the labor on it to a great extent; he had some carpenters over there to work; there were quite a number of men he had at work over there at the same time he was grading and building a barn and building a boat-house.

Q. He worked on it with the men?

A. Yes, sir; Charlie.

Q. By Charlie you mean Mr. Sutton, the husband of the plaintiff?

A. Yes, sir.

Q. Do you know of any further acts than those you have spoken of in that direction?

A. No; I think I have stated all I know about it; all that I can recollect now, at any rate.

Cross-examined:

Q. How long have you known Mr. Kenyon; about how long?

A. Ever since my memory commences.

Q. About how many years?

A. I think I would begin to recollect at 6 or 7 persons outside of my own family; 40 years since.

Q. What were your relations to Mr. Kenyon since he lived here in 1871 or 1872?

A. Quite intimate; I was his physician, sir.
Q. Quite intimate?
A. Quite intimate.
184 Q. Did he have the dyspepsia when he first came here?
A. Yes, sir.
Q. Neuralgia when he first came here?
A. Yes, sir; quite frequently; I don't mean it occurred every day, but repeatedly and quite frequently.
Q. What portions of the year did they occur?
A. He only remained here during the summer months.
Q. He spent the summers in Oconomowoc substantially?
A. Yes, sir.
Q. Up to the time of this attack of apoplexy in 1879, what was he doing about here in the summer; what did you know him to do?
A. He usually amused himself by rowing and sailing on the lakes.
Q. Camping out?
A. He occasionally did, but very little.
Q. He went fishing?
A. Yes, sir.
Q. He was a gentleman of fortune and leisure?
A. Yes, sir.
Q. He lived at your sister's and Mrs. Sutton's house?
A. Yes, sir.
Q. The place on Main street where they lived had been given by him to Mrs. Sutton, had it not?
A. I don't know.
Q. Did you not so understand it?
A. No, sir; in fact, I know nothing about that place.
Q. Did you live near that place?
A. Directly opposite.
Q. Your sister and her husband went there to live in 1874, did they not?
A. I think in the summer of 1874.
Q. You know that Mr. Kenyon was paying them for his board?
A. No, sir.
Q. You do not know that?
A. No, sir.
Q. Do you know whose was the furniture in the house?
185 A. The furniture in the house was mostly my sister's, because it came from my father's house.
Q. Did he have furniture there?
A. None that I know of.
Q. How frequently up to 1879 did you know Mr. Kenyon to be confined to his bed from dyspepsia?
A. I do not know that he was confined to his bed at all from dyspepsia.
Q. How serious was this dyspepsia?
A. So serious that he had to be very careful what he ate.
Q. Every dyspeptic has to be careful?
A. We all ought to be. It was necessary he should be particu-

larly so, because these attacks of neuralgia were produced by the condition of the stomach.

Q. Was the dyspepsia alone, unaccompanied by the neuralgia, a matter of any serious concern?

A. I don't know as I comprehend your question. Do you mean serious, as alarming, as dangerous?

Q. Either as dangerous or affecting his ability to be about?

A. It made him morose.

Q. As to this neuralgia, how often have you known him to have neuralgia in the summer here?

A. Twice a week.

Q. Regularly?

A. No; it would not occur each week on the same day, on different days. He would have an attack of neuralgia, and perhaps not get over it in four or five days in one week; the next week he might be free from it. Then it would go on, and he would have a slight attack, and then it would be repeated very quickly.

Q. How long an interval between those attacks?

A. I don't think I ever knew 10 days.

Q. How often did you attend him?

A. Constantly.

Q. In every attack?

186 A. I don't know as I saw him in every attack. He was there under my treatment constantly.

Q. Did you keep books of your visits to patients those years?

A. Yes, sir.

Q. Will those books show the number and frequency of the visits?

A. No, sir; not entirely and completely of my attendance upon Mr. Kenyon. Frequently he would come to my house and pay me for my consultation. Frequently I would meet him in the street. Frequently I would be over to my sister's of an evening. The years my mother spent here I made it a point to be there every day, and at those times was consulted frequently by Mr. Kenyon. At the times he paid me there would be no appearance on my books. When he did not pay me then my books would show.

Q. Can you tell us generally what you prescribed for his dyspepsia, and what you prescribed for his neuralgia?

A. I always put him upon morphine for his neuralgia. It was the only thing that quieted him. I used the usual remedies for his neuralgia.

Q. For dyspepsia how did you treat him?

A. I pursued the regular routine.

Q. Did he improve in regard to his dyspepsia?

A. He did when he followed directions, and was particular about his diet.

Q. Up to 1879 did he not go about alone?

A. Yes, sir.

Q. Go out fishing alone?

A. I never met him fishing, because I never went myself.

Q. After this attack of appoplexy in 1879, what is your remembrance as to his going out alone?

A. I never knew of his going out alone but once.

Q. When was that?

187 A. During a yacht race he sailed a boat, and told me he had gone to sleep as the reason he came in far behind.

Q. During the time they were building this house did he not row over there alone?

A. Not to my knowledge. He may have done so.

Q. How serious was this attack of apoplexy, and where did it affect him?

A. There was no general paralysis. His apoplexy proved to be congestive; it was a congestive attack; he was unconscious, or he was semi-unconscious; you could rouse him; he would answer in monosyllables; he could not think; he could not answer a long question; he had no ideas; that condition lasted two days, I think.

Q. Then after that?

A. After the two days he gradually recovered, and recovered the power of his muscles to a certain extent; he never recovered it fully.

Q. How was his mind after 1879?

A. I do not think he ever recovered his mental faculties perfectly and completely.

Q. After 1879 did he not make visits to New York alone and unattended?

A. Not to my knowledge.

Q. Did he not go to New York and return unattended?

A. He may have done so; I do not know.

Q. Was it possible for him to do it?

A. It was contrary to my desire and directions.

Q. How as to the possibility?

A. It was a very dangerous and risky thing for him to do.

Q. How was Mr. Sutton's health during those years?

A. I think Mr. Sutton's health since he has been in Oconomowoc has been rather good, with three exceptions. I think there have been but three times I have been called to Mr. Sutton; once before they moved on Main street, and twice since that time. I do not recollect having made Mr. Sutton since they moved on Main

188 street but four visits. He may have consulted me more than that. He has been to the house frequently.

Q. He has been an invalid all those years?

A. To a certain extent.

Q. Been engaged in no business since 1872?

A. I don't know—he has been boat building.

Q. Building boats for himself?

A. Sells them.

Q. Does he pursue that as a regular occupation and business?

A. No; I guess not.

Q. Have you known him to be engaged in any regular business?

A. He has traveled for some wire company—sieve company—in St. Louis, with which my brother was connected, and was also traveling for some camp-chair company in Chicago.

Q. When was that?

A. The camp chair must have been in 1880 or 1881, and for the wire factory or sieve company it must have been in 1877 or 1878.

Q. Where did he travel?

A. He traveled inside of America; inside the United States; he was down through the South; he was in New York and St. Louis.

Q. Do you know as to whether Mr. and Mrs. Sutton accompanied Mr. Kenyon to New York in the fall of 1880?

A. I do not know.

Q. Where did Mr. and Mrs. Sutton pass the winter the year before Mr. Kenyon died?

A. In New York.

Q. With Mr. Kenyon, as you understand?

A. Yes, sir.

Q. And for two or three years before he died did they not spend the winter with Mr. Kenyon in New York?

A. I judge that they did; they were all in New York; but whether they were together in New York I do not know.

Q. Did not you understand they were; did not you understand that Mr. and Mrs. Sutton were living at Mr. Kenyon's house?

189 A. I understood they had a house on 124th street; but I am under the impression they did not take that house until the fall of 1880, and that Mr. Kenyon occupied the same relation to them he did here.

Q. Did you understand whose house it was they were living in?

A. I judge it was Mr. Kenyon's; I don't know; they may have rented it.

Q. Of any arrangement with Mr. Kenyon about paying board, or anything of that kind, you are ignorant?

A. Yes, sir.

Q. With regard to the purchase of that Breck place—were you familiar with the fact of the purchase at the time?

A. Mr. Kenyon told me he was about negotiating for it.

Q. When was that?

A. That was during the summer of 1880.

Q. And soon after the purchase the boat-house was built?

A. Yes, sir; right away.

Q. You spoke of men being employed there in grading, &c.?

A. Yes, sir.

Q. Don't you know that Mr. Kenyon paid for that labor?

A. No, sir.

Q. Do not you know he did pay for it?

A. No, sir.

Q. Do you know whether Mr. Kenyon was over there superintending or doing anything about it?

A. No, sir; I don't know that he was superintending it; I know he was there; I saw him.

Q. What did you see him doing?

A. He did not do anything while I was there; he was walking around.

Q. Do you know of Mr. Kenyon's coming into Milwaukee and having plans made for the house by an architect?

A. No, sir. I know the plans went to Milwaukee. The plans were drawn by Charlie, by Sutton, and I know the plans were
190 afterwards taken to Milwaukee to have an architect improve the external appearance.

Q. What sort of a man was Mr. Kenyon with regard to being talkative about his matters?

A. He was very reticent.

Q. Did not often speak about his matters to any one?

A. I should judge not.

Q. Did not speak to you in regard to his matters?

A. Not much.

Q. What furniture was taken over on to that place and when?

A. I do not know.

Q. Whose furniture was it; do you know that?

A. The most of it used to belong to my mother.

Q. The most that was taken over there?

A. Yes, sir.

Q. Was any of Mr. Kenyon's taken over there?

A. I did not know he had any.

Q. You say they had the keys?

A. Yes, sir.

Q. What do you mean by that; where were the keys kept?

A. I do not know.

Q. What did you mean by saying they had the keys?

A. One day I happened to be there, and Van Horn wanted to get in there, and he came over to Mr. Sutton for the keys. Mr. Sutton pulled the keys out of his pocket, I think; he may have gone to the house to get them, but he gave the keys to Van Horn.

Q. In the fall of 1881, when Mr. and Mrs. Sutton went to New York with Mr. Kenyon the last time Mr. Kenyon went, where were the keys of that place while they were all gone?

A. I can only tell from what Mr. Sutton told me, that he had left them with different of the workmen who were to prosecute the work toward the completion of the building.

Q. You know nothing of your own knowledge where the keys were, or who had them?

A. No, sir.

191 Q. Whom did you understand was paying for that house that was being put up there?

A. I do not hardly know how to answer your question.

Q. Who furnished the money to build that house?

A. Mr. Kenyon; that is my supposition.

Q. What were the financial circumstances of Mr. Sutton from 1872 to 1883?

A. I do not know.

Q. Don't you know anything about it?

A. No, sir.

Re-examined:

Q. As to the year, you say you think it was 1879, somewhere in

the fall; I don't know whether I asked you whether you were sure that that was the year or not.

A. I stated that as my impression.

Q. Will your books tell the year?

A. Hardly.

Adjourned to Wednesday, at 10.30 a. m., May 2d, 1883.

WEDNESDAY, *May 2d*, 1883.

Examination resumed, pursuant to adjournment. Same parties present.

CLARENCE I. PECK, called by plaintiff, being sworn, testified:

Q. I would ask you to state if you are acquainted with the parties to this suit, or either of them.

A. I am acquainted with the plaintiff and with Mr. Sutton.

Q. How long have you been acquainted with her?

A. Quite a number of years; I do not know exactly how many; seven or eight years, I should say.

Q. Were you acquainted with John S. Kenyon in his lifetime?

A. Yes, sir; I was quite well acquainted with him.

Q. At what place were you acquainted with these parties, Mr. and Mrs. Sutton and Mr. Kenyon?

A. Partly in Oconomowoc; that is where I first got acquainted with them; and I have also known them in other places since—New York and Chicago.

192 Q. I would ask you to state if you, in any portion of the years you speak of, resided at Oconomowoc, in this State.

A. Yes, sir; our family have had a summer place in Oconomowoc for a number of years, and we generaliy reside there during the summer season anywhere from three to five months at a time.

Q. You may state if you had a conversation with the deceased, John S. Kenyon, in his lifetime in relation to his building a house on the property formerly known as the Breck place, in the city of Oconomowoc.

A. I frequently talked with Mr. Kenyon in regard to the place that I knew he had bought there. I suppose you want to know anything I can say definitely. The first definite conversation I remember to have had with him was one time there on the street in the city of Oconomowoc, and Mrs. Sutton and Mr. Kenyon drove up in their wagon or carryall and asked me if I did not want to ride over to the new place—the place he had bought not a great while before. I went over with them, and in the course of the ride I remember remarking to Mr. Kenyon he had a beautiful location, and I presumed he would make it an ornament to the place. Mrs. Sutton said, "That is my place," and Mr. Kenyon assented. After that, in the course of the ride, Mr. Kenyon remarked that he intended to finish up the place in good style for the children, as he called them; meaning Mr. and Mrs. Sutton. That is the first definite conversation I remember to have had with him—and then one other after-

wards. I was at the house where Mr. Kenyon lived, on Main street, with Mr. and Mrs. Sutton. I knew Mr. Kenyon had been in the habit of being over to the new place superintending the work, and I saw him standing in the yard there at a time when he was generally over there. I said, "You are not over to your new
193 place to-day?" He said no; the sun seemed to affect his head; besides that, he said, "The place belongs to Charlie and Sortie, anyhow, and I thought I would give the job of superintending it to Charlie." That is the only two definite conversations I remember having had with him, although I had conversations, when the matter came up, all confirmatory of this.

Q. Can you tell about the time, about the date, when these two conversations took place?

A. The first was—I think Mr. Kenyon bought it in 1880—before he commenced to improve the grounds. I think he bought it in the latter part of the year; this was in the following year from that time, about the time he commenced improving. There was an old house on the place which he removed in order to make make room for the new one; I think it was about the time he commenced the new house I had the conversation with him. I went over with him in the carriage. The second was when the work had progressed, and he said he had given up the job of superintending it to Mr. Sutton.

Q. That is all you remember?

A. That is all I can state as to any definite conversation with Mr. Kenyon that I can distinctly remember now, although I had frequent talks with him that were confirmatory of this.

Cross-examined:

Q. What time of year was this first conversation?

A. I cannot state very definitely the time of the year; I should think it was about June, 1881. I know he had commenced to move the old house and build the new one but a short time before.

Q. Had the foundation of the new house been then laid?

A. The old house had been moved, and the foundation was being laid when I went over this time.

194 Q. How long a ride did you have with him that day?

A. I should think a ride of about 15 or 20 minutes, and after we got over there we went around the place.

Q. When was the other house moved?

A. My recollection is in the early part of the summer of 1881.

Q. At what point did you get into the carryall with Mrs. Sutton and Mr. Kenyon?

A. I cannot say exactly, because I had ridden with them several times. It was along the street in the city of Oconomowoc somewhere. They took me up two or three times when they had been riding, so I would not like to state definitely.

Q. State, if you please, the conversation that took place on that occasion, the first occasion you have spoken of, just in the order in which it took place, and the order of the speakers, and just the exact language that was used, if you can remember it.

A. I shall not attempt to give the exact language, of course. The commencement was in regard to his having a fine location there, and the next thing was Mrs. Sutton's remark, "That is my place." I know Mr. Kenyon assented to this, although I cannot give you the words.

Q. Did he assent to it by not denying it, or by language?

A. He assented to it in language.

Q. What was his language?

A. That I cannot give you.

Q. He simply assented to it?

A. Simply assented to it. He made some pleasant remark he was in the habit of making; I could not give you the exact language.

Q. How long have you known Mr. Kenyon?

A. I should judge before his death about four or five years.

Q. Then you did not know him before the time that he came to Oconomowoc to live?

A. I first met him in Oconomowoc.

195 Q. You knew him in New York?

A. Afterwards.

Q. In what years?

A. He lived in New York at the time of his death. I met him prior to that time within less than a month from the time of his death. I think that occurred in the early part of 1882.

Q. Had you known him in New York except for a month or so before his death?

A. No, sir; not prior to that time.

Q. Where was he living?

A. I do not remember the name of the street; up towards Harlem.

Q. In his own house?

A. I understood it so.

Q. Was Mr. and Mrs. Sutton with him in his house?

A. Yes, sir; at that time I met him, Mr. Sutton, and he called on me at the hotel, and we walked down town together, and then he called again afterwards; then I met him at his own house; I called there.

Q. That was about a month, you think, before his death?

A. I think it was less than a month considerably before his death. I know his death was sudden.

Q. What was the condition of his health at the time that you met him in New York?

A. I did not think he was looking very well; he seemed to be cheerful and exercised considerably.

Q. Seemed to be active?

A. Quite active.

Q. With respect to this second conversation you had, what time of the year was that?

A. That was later on. I could not give you the exact time, about the time the roof of the house was being put on; it was during the summer season or early part of the fall.

Q. Mr. Kenyon at that conversation was in the yard of the premises, on Main street, where he lived with Mr. and Mrs. Sutton?

A. Yes, sir; he had a boat landing there, and we used to use it for a down-town landing; it may have been when we were
196 using it, or I may have met him at the front gate; but I remember distinctly meeting him about the time stated and having the conversation.

Q. Will you state to me just what he said on that occasion as nearly as you can give his language?

A. My remark to him was that he was not over to his place as usual; he was in the habit of being there. He said no, he was not feeling very well; the sun seemed to affect his head when he was outdoors; besides that the place was for Charlie and Sortie anyhow, and he thought he would give the job of superintending it to Charlie after this.

Q. Did he use this expression "Charlie and Sortie?"

A. Yes, sir. He used this expression very often in talking about them.

Q. In your direct examination you said he used the expression "the children." Which did he use on that occasion?

A. I am quite positive on the latter occasion he said "Charlie and Sortie," and on the first "the children."

Q. That was at the time that you were riding with them?

A. Yes, sir.

Q. How old a man was Mr. Kenyon?

A. I can give you my idea—60, 65, along there—I should think fully sixty.

Q. How old a gentleman is Mr. Sutton?

A. I don't know except from judging from seeing him; I never asked his age.

Q. According to your judgment?

A. Forty-six or seven.

Q. And how old a lady is Mrs. Sutton?

A. I should judge she might be a year or two younger than her husband; maybe she is more than that.

Q. How often were you in the habit of seeing and conversing with Mr. Kenyon in his lifetime?

197 A. I presume sometimes I met him half a dozen times a day.

Q. How near was your place to him?

A. What would be equivalent to two or three blocks in the city, and he lived on my way down town. In order to go down town it was necessary for me to pass his place.

Q. What was the character and habit of Mr. Kenyon in regard to his speech; was he free in his conversation, or reticent in regard to his matters?

A. I do not know that he was particularly free, and I do not know that he was very reticent either. I do not suppose that he was in in the habit of volunteering conversation in regard to his matters. I never knew him to be loth to talk about them.

Q. With reference to the conversation that occurred when you were riding with them, and when Mrs. Sutton said that was her

place, did you understand from that conversation that she had the title to that property?

A. That is one reason that I remember this conversation as a definite conversation, because it struck me at the time—I had always supposed he had bought the place for them, and with the intention of giving it to them, and it occurred to me he might have given it to them; I understood from what I heard that he had bought the place and intended to give it to them; that was the general talk around there; I had heard of that before.

Q. From them?

A. Not only from them, but outside; it was the general understanding.

Q. You gathered from that conversation or assumed he had already given it to them?

A. No, sir; but it rather put me on inquiry to know whether he had done so.

Q. You did not gather from that conversation he had actually given it?

A. I supposed he may have done so.

198 Q. Then you made inquiries?

A. No, sir; it made me inquire of myself whether they had the title; my idea was he probably had passed the title to them.

Q. Did you have any conversation with him in New York about the place?

A. None at all that I remember. I may have asked him when he was going to commence operations in the spring—nothing I can testify to.

Q. Nothing with regard to Mrs. Sutton's connection with it?

A. Nothing that I can remember now.

Q. In what business are you engaged?

A. I am at present managing the estate in which I am interested. I am not in what you would call professional business; it is pretty active business sometimes.

Re-examined:

Q. Do you remember anything further in relation to the matter any other conversation you can remember definitely?

A. I do not remember any other conversation I could testify to definitely, but as regards this matter I stated, one reason I remember the conversation I had in the carriage was I thought the title might already have passed, and another reason was I heard the place—it was generally understood the place was to be for Mr. and Mrs. Sutton, but that was the first definite information I had that the place was theirs, or to be theirs. Another thing that made me remember the second conversation, Mr. Kenyon's speaking about giving the job of superintending the place to Mr. Sutton; I knew they were very kind to him, and I thought it was his plan to give them the place or give them some remuneration.

Q. You know nothing about it further than you have stated?

A. Not that I can testify to definitely.

199 Plaintiff offers in evidence the plans and specifications of the new building referred to by the witnesses, and the same may be certified by the examiner and returned into court unattached to the depositions, and it is understood that they are not to be printed with the testimony. Marked "Exhibit C."

FERDINAND W. PECK, being sworn in behalf of plaintiff, testified:

Q. Where do you reside?

A. In Chicago; I suppose my legal residence is in Chicago. I have been in the habit for several years of spending the summer season at Oconomowoc, Wisconsin.

Q. I would ask you to state if you are acquainted with the plaintiff; and, if so, how long have you been?

A. Yes, sir; I am very intimately acquainted with the plaintiff.

Q. Were you acquainted with John S. Kenyon in his lifetime?

A. I was very intimately acquainted with him.

Q. Where did you know him?

A. I knew him at Oconomowoc, Wisconsin, and have met him elsewhere, but generally there.

Q. About how long was your acquaintance?

A. My acquaintance lasted over a period of, I should say, fully ten years.

Q. I would ask you to state if you are acquainted with the premises in Oconomowoc on the south bank of Lake La Belle, known as the Breck property, that Mr. Kenyon was erecting a house on?

A. Yes, sir; I presume that was the place that has since been called "The Oaks."

Q. Yes, sir.

A. I am well acquainted with the place, and have been there many times.

200 Q. State whether you ever had any conversation with the deceased, John S. Kenyon, in relation to that property being transferred to the plaintiff, or otherwise.

(Objected to.)

A. Yes, sir; I recollect various interviews; I do not say, but I may say many interviews.

Q. State fully each interview in relation to that matter.

Mr. JENKINS: And the time.

A. I will state generally that I cannot state the conversations in detail, nor the exact times. During the summer of 1881, while spending the summer at Oconomowoc, I had various interviews with Mr. Kenyon on the subject of the premises in question, two of which I remember quite distinctly, though of course I cannot fix the exact dates, any more than it was during that summer season of 1881; one occurred upon the premises in question. I had gone over there in a sail-boat with Mr. Kenyon and Mr. Sutton, who, I think, is the husband of the plaintiff, and he said to me after examining the premises that he was building that place for—I think he said "these children," alluding to Mrs. Sutton and her husband; that he

intended to give it to them as a home; that Mr. Sutton's health, he thought, was much better in Oconomowoc than in New York or elsewhere, where he had been in the habit of living, and he was determined to get them fixed comfortably in that section or locality; he thought the place was eligibly located and pleasant for them; that Mr. Sutton was taking a great interest in the construction of the building, in which he was prominent as the superintendent, or workman, if you please, for that purpose, and that his idea in having it constructed was to make it a home in the future for Mr. and Mrs. Sutton, calling them his children, and by the names of Sortie and Charlie; that is one interview—that is the substance of it.

201 Another time I recollect being on Lake La Belle in a little yacht called "The Sprite," which Mr. Kenyon was in the habit of sailing, when he said to me, in substance—I cannot remember the language or the details of the conversation, but in substance what I have related as having been said at this time on the premises in question.

Q. Any other conversation that you remember?

A. I cannot state defininely as to time or place, but on many occasions during the said summer of 1881 Mr. Kenyon gave me to understand that his purpose in building the improvements upon the premises was for the use and occupation of Mr. and Mrs. Sutton as a home. I remember being upon these premises with Mr. Kenyon on at least 15 or 20 occasions during that summer, and I think on nearly every occasion something arose in our talk—we were very intimate and social when we met—that gave me that understanding as I have stated. I may add that he stated he had had a comfortable home with these people, and was very grateful for them for their care and attention during the various times of illness, and was glad to be in a position to build such a place for them to use after his death; that was the substance of what he gave me to understand.

Q. You may state if you can recall to mind any conversations of his in which he mentioned about his remaining with them in the future.

(Objected to.)

A. I inferred from what he said that he intended to remain with them as long as he lived. I do not remember whether he distinctly said so in so many words or not to me.

Q. I would ask you to state if you know who erected the boat-house and worked upon it on that place.

202 A. I know that Mr. Charles T. Sutton did a great deal of work on it; I guess the entire work on it; it was his own idea and design, I think.

Q. You may state if you know who had possession and management and care of the property.

A. I should say that Mr. and Mrs. Sutton had possession of the property as soon as any possession was taken by anybody, and have had the management and care from the time of its inception, as I understand it, up to the present time.

Cross-examined:

Q. When was this first conversatien which you have related—as to what time in the season?

A. I have already stated I could not state as to what part of the season definitely. I said it was very soon after the beginning of these improvements upon this property.

Q. Do you remember of Mr. Kenyon going to New York that summer?

A. It is my recollection that he did go to New York. I know he frequently went during the summer season, and returned to Oconomowoc before the fall.

Q. Do you remember how long he was away that summer on his visit to New York?

A. No, sir; I do not.

Q. Do you remember at what period of the summer he went?

A. No; I don't remember that. I do not remember, sir.

Q. Do you remember whether this first conversation was before he went to New York or after his return?

A. I am quite positive it was before he went.

Q. And the second conversation.

A. I could not recollect as to that.

Q. Was that before he went or after his return?

203 A. I could not recollect. I think there were several conversations both before and after on the subject.

Q. In this narration of those conversations you have not undertaken to give the language Mr. Kenyon used?

A. No, sir; certainly not. I had no occasion to fix it in my mind.

Q. It was a casual conversation such as frequently happens between friends?

A. Yes, sir.

Q. You have only given your recollection of the substance?

A. Yes, sir; that is all; and the idea it carried to my mind was very clear and distinct as to his intentions.

Q. Your impressions at that time?

A. Yes, sir.

Q. What do you mean by possession as you use the word?

A. In answering that question I hesitated, because it was rather an indefinite term. Legal possession in one thing, actual possession is another kind of possession, and temporary possession is another kind of possession. I answered it as intelligently as I could by stating that as soon as the improvements were in such a condition that anybody would be apt to take possession, I think Mr. and Mrs. Sutton took possession.

Q. Was there any possession taken or any one left on that place until after Mr. Kenyon's death?

A. I cannot say as to that, as I do not remember distinctly the date of Mr. Kenyon's death. I know that Mr. and Mrs. Sutton were there daily; whether the premises were so far completed before his death that they remained over night I cannot say.

Q. Did not Mr. and Mrs. Sutton, in the fall of 1881, accompany Mr. Kenyon to New York?

A. I am not sure, but I think they did.

Q. And did they return until after Mr. Kenyon's decease?

204 A. That I cannot say. I was not there and would not be in a position to know anything about it.

Q. Up to the time that you left Oconomowoc yourself, in the fall 1881, did not Mr. and Mrs. Sutton and Mr. Kenyon occupy the little house on Main street?

A. My recollection is that they did.

Q. You were at Oconomowoc during the summer of 1882?

A. Yes, sir.

Q. And during the summer of 1882 Mr. and Mr. Sutton occupied what is known as the little house on this place in question, "The Oaks," did they not?

A. I think they did. I called upon them there on several occasions.

Q. Had they ever occupied that house, to your knowledge, prior to the summer of 1882?

A. I think not, though I am not entirely positive.

Q. Might I ask you what your profession or business is?

A. It is a hard question to answer. I am interested in and represent a good many interests, consisting of real estate, railroad property, etc. All my time is taken up in the management of those interests.

Q. How intimate may I ask you were you with Mr. Kenyon? To what extent was that intimacy?

A. I was exceedingly intimate; saw him almost daily almost every summer for ten years during a period each summer of three months at least. He was at my house constantly, and I was where I could meet him almost daily.

Q. Did you ever have any conversation with him as to the terms upon which he was living with Mr. and Mrs. Sutton?

A. No, sir; not especially that I can recollect. I had an opinion as to those terms, but indirect and indefinite. Whether I

205 derived that opinion from anything he said to me I do not remember.

Q. He was represented to be a gentleman of property and leisure?

A. Yes, sir.

Q. What were the financial circumstances of Mr. Sutton as you understood them?

A. I always understood that Mr. Sutton was not a gentleman of means and owned comparatively little property.

Q. What was the habit of Mr. Kenyon as to being outspoken or reticent in regard to his matters?

A. I do not think he was a very outspoken man in disposition, and probably would not have said what he said to me if we had not been intimate and met so friendly, and he knew that I felt an interest in what was going on about Oconomowoc and its improvements, etc.

HENRY H. SHUFELDT, called by plaintiff, being sworn, testified:

Q. Where do you reside?

A. In Chicago.

Q. Are you acquainted with the plaintiff in this case, Sarah S. Sutton; if so, to what extent?

A. I have known her quite well for the last eight or ten years; ever since they have been in Oconomowoc.

Q. Also with her husband?

A. Yes, sir; more intimately with him, because I have associated with him in boat-building, boating, and one thing and another.

Q. Were you acquainted with John S. Kenyon in his lifetime?

A. Yes, sir.

Q. State when and where, and to what extent.

A. All through his life at Oconomowoc, extending over some 7 or 8 years somewhere.

Q. Were you at any time a resident of Oconomowoc?

A. Only for the summer season; I have been for the last 20 years.

206 Q. You own property there and are interested in its improvement, I suppose?

A. Yes, sir; largely.

Q. Are you acquainted with this property in dispute, described by the last witness?

A. Yes, sir.

Q. About how long have you been acquainted with that?

A. 20 years

Q. You may state as to the fact whether you had any conversation with the deceased, John S. Kenyon, in relation to his objects in buying that property and whom he was buying it for.

(Objected to.)

A. Well, sir, I never had but one conversation with Mr. Kenyon on the subject in question. I had been out riding on horseback around Lake La Belle in the morning and I stopped at this new place they had purchased perhaps a few months before. While I was sitting on my horse Mr. Kenyon was sitting on a pile of lumber, and I asked him, "What are you doing here?" He says, "I am building a home for Charlie," meaning Mr. Sutton; and I said, "What are you going to do with the little house?" He says, "We are going to improve it and see if we can make this thing self-supporting," or some such thing. I inferred they were going to make a little summer resort and put the Suttons in a position where they could support themselves. I said, "I do not know but I can find a tenant for it." I mentioned the name of my sister-in-law, who lived in Chattanooga, and was talking of coming the next summer. That is all the conversation I had on the subject.

Q. Did he make any reply when you said you could find a tenant for it?

A. No, sir; that is all the conversation I ever had with him.

Q. I will ask you to state if you know who built the boat-house, constructed it.

A. Mr. Sutton built it himself entirely, I think; he may have had some little help, but he did most of the work himself.

207 Q. Who apparently was in possession of the property?

A. Mr. Sutton had the management of it, certainly as far as the management was concerned was in possession. I very frequently went over there and found them all in possession, sitting under the trees.

Q. Whom do you mean by "all?"

A. Mr. and Mrs. Sutton and Mr. Kenyon.

Q. The three were frequently together?

A. Yes, sir; they were always together.

Q. Can you state as to the facts whether Mr. Sutton had the boats and other things fixed over there on the place?

A. Yes, sir; I helped him get one in the boat-house myself.

Q. To what extent had he his boats and things in the boat-house?

A. I think this was in the spring when the boat-house was built; it was some time earlier than they started the house. The boat-house was finished, and when he put the boats in he took two old barges—I think they were left on the other side—took them in there, and put some things in the barn.

Q. What things in the barn?

A. I don't know, sir.

Q. Can you state further as to any acts of possession, or what other things he had there on the place?

A. I don't remember anything particularly except lumber and stone and grading—they had teams there grading at different times I was over there; I was over there a great many times during the summer, in a boat and on horseback.

Q. Who was the general manager there apparently?

A. I thought Mr. Sutton; I always understood he paid all the bills.

Defendant moves that the last answer be stricken out.

Q. You may state if you think of any further acts of possession that Mr. and Mrs. Sutton did.

A. I do not know of any other.

208 Q. You think of no further conversation than the one you have stated?

A. No, sir; I had none.

Cross-examined:

Q. When was that conversation?

A. I think in the latter part of the summer, or early in the fall of 1881.

Q. Did you understand from that conversation that Mr. Kenyon had deeded that property to Mr. Sutton?

A. I did not, sir.

Q. But that he intended to give it to them?

A. Yes, sir; as a permanent home.

Q. What did you understand to be Mr. Sutton's pecuniary ability at that time?

A. We always thought at Oconomowoc that they were more or less dependent upon Mr. Kenyon.

Q. Did you suppose or understand that Mr. Sutton was paying for the building of this house from his own means?

A. From Mr. Sutton's own means?

Q. Yes, sir.

A. No, sir; I supposed it was being paid for by Mr. Kenyon.

Q. The possession you have been speaking of is such possession as any one has who is improving and building a house?

A. Yes, sir.

Q. You saw Mr. Kenyon there?

A. Yes, sir.

Q. As frequently as any one else?

A. No, sir; he left at one time, and Mr. Sutton was left in entire charge, and spent all his time there.

Q. That was while Mr. Kenyon was absent in New York?

A. I do not know where he was.

Q. During the summer?

A. I think so.

Q. Do you know of Mr. and Mrs. Sutton in the summer of 1882 occupying the little old house?

A. Last summer? Yes; they occupied it.

209 Q. Did you ever know them to occupy it before last summer?

A. Not unless they occupied it in the spring; they might have done so before we came there.

Q. Before January, 1882, did you ever know them to occupy it?

A. No, I did not.

Re-examined:

Q. You say you understood; how did you understand it; did you have definite knowledge, or was it what you inferred?

A. It was quite definite when he told me plainly he was going to build this home for Charlie, or some such words.

Q. I refer to the means you spoke of. He asked you if you inferred. I ask you if it is a mere inference, or if you have any positive knowledge?

A. I had no knowledge only what such an answer would give me.

Q. All your inferences were derived from that statement?

A. That is all.

(Title of Cause.)

Depositions of witnesses taken pursuant to the annexed stipulation and notice, before John A. Shields, Esq., United States commissioner, at his office, in the city of New York, on May 29th, 1883, and following days.

NEW YORK, *May 29th*, 1883.

Appearances:

For complainant—Geo. F. Westover, Esq.

For defendants—Edgar K. Brown, Esq.

There also appeared Erastus F. Brown, Esq., one of the defendants, in person.

210 *Depositions of Witnesses for Complainant.*

SAMUEL A. HILLS, being duly sworn and examined, testified as follows:

Direct examination by Mr. WESTOVER:

Q. Where do you reside?
A. At 53 East 123d street, New York city.
Q. What is your profession?
A. Practicing physician.
Q. How long have you been a practicing physician?
A. Since 1846. Perhaps I might say, in connection with that, that there was a part of that time that I was not in active practice.
Q. Did you know John S. Kenyon in his lifetime?
A. Yes.
Q. How long before his death were you acquainted with him?
A. My first acquaintance with him was in 1847.
Q. Do you know where John S. Kenyon resided in the winter months during the last two or three years of his life?
A. In 124th street in this city; the number I do not remember; it was near Second avenue.
Q. Do you recollect his death?
A. I do.
Q. Do you recollect now in what month and year his death occurred?
A. I do not recollect just now; by reference to my books I could tell.

(It is admitted that he died in January, 1882.)

Q. You recollect the circumstances of his death?
A. I do.
Q. Where did he die?
A. At his place of residence on 124th street, before mentioned.
Q. Did you attend him during his final sickness?
A. Yes.

211 Q. When were you called to attend him at his final sickness?
A. I cannot give the date, if you want the exact date of the month, without reference to my book, but it was on the evening of the day on which he was taken ill.
Q. What time in the evening, about?
A. About ten to eleven, as my memory serves me.
Q. Who called you?
A. The servant girl at the house.
Q. Did you go that evening in answer to the call?
A. Yes.
Q. Whom did you find at the house?
A. I found Mr. Kenyon and Mrs. Sutton; I do not recollect whether there were others; those were there.
Q. Was the girl there that called you?
A. The girl was there, yes; I saw her.

Q. Do you recollect her name?
A. No; I do not.
Q. How near your residence was Mr. Kenyon's?
A. Some four to five hundred feet away.
Q. On the same street?
A. Yes.
Q. Who resided in the house with Mr. Kenyon?
A. Mr. Charles T. Sutton and his wife.
Q. Is she the Sarah S. Sutton who is complainant in this suit?
A. Yes.
Q. When you went to the house in what condition did you find Mr. Kenyon?
A. I found him lying upon the floor in the back parlor, with his head bolstered a little; he was in a semi-unconscious state—physically almost in a state of collapse; with cold extremities and slow pulse.
Q. Who was then attending him?
A. Mrs. Sutton.
Q. How long did you stay with him that night?
A. I stayed all that night.
Q. How long was he sick after that—previous to his death?
A. I think it was the fourth day of his sickness that he died.
212 Q. The fourth day after he was taken sick?
A. Yes.
Q. The fourth day, was it, after you were called?
A. I think it was the fourth day.
Q. Did you visit him frequently or much of the time during that final sickness?
A. Yes.
Q. How much were you at his house with him during that sickness?
A. Nearly all the time each night and the larger part of the day; not all, but was out and in during each day.
Q. Who had charge of him during that sickness as nurse; to whom did you give directions for his treatment?
A. To Sarah S. Sutton.
Q. How much was Mrs. Sutton in his company and how much did she give him attention during his last illness?
A. She was there all the time, save one occasion she was out a little time, as I remember; she was constantly with him, I might say.
Q. Nights?
A. Nights as well as days.
Q. Were you there at his death?
A. I think I was not just at the time that he died.
Q. Just previous to his death?
A. Yes.
Q. Was Mrs. Sutton with him then?
A. Yes.
Q. Of what disease did Mr. Kenyon die?
A. We would call it appoplexy in common parlance.

Q. Previous to that final sickness had you seen Mr. Kenyon very often?

A. Yes.

Q. Had he complained to you previous to that sickness of any pains which you would consider symptoms of any particular disease, or not?

A. I have heard him speak of his head troubling him many times—I might say for years.

213 Q. From your knowledge of Mr. Kenyon's physical health and condition during the last few years of his life, was it safe to leave him without an attendant or nurse?

(Objected to on the ground that the acquaintance of the witness with Mr. Kenyon has not been shown to be sufficient to lay the foundation for an answer to this question, which would be the answer of an expert.)

A. To answer that properly, as appears to me, I should say that after his sickness, which has not been shown here at all, but which I had been informed of, I had observed when I had occasion to see him, as I did in the winters, and sometimes in the summer, that in his condition he showed signs of weakness—infirmities, I might say, of body; not particularly of mind that I know of, as I had not any business transactions with him, but I had observed that there was a weakness of his physical powers.

Q. Did he or did he not require more than ordinary attention and care.

(Same objection.)

A. I should say yes.

Q. Did you sometimes visit the family, Mr. and Mrs. Sutton and Mr. Kenyon, at their residence?

A. Yes.

Q. Do you remember at what time they came to their residence in 124th street, this city, from the West?

A. In the fall; I do not remember the date.

Q. How often were you in the house after their arrival here in the fall, during their stay here, previous to Mr. Kenyon's death?

A. Sometimes once a week, sometimes twice, sometimes three times.

Q. Whom did you usually see when you went there?

A. Those of the family that would be home; it was not always the same; if they were all there I used to see them; by the family I mean Mr. Kenyon and Mr. and Mrs. Sutton.

214 Q. Do you know anything about Mr. Kenyon's having been sick any portion of that winter, previous to his final sickness?

A. I do not recall, now, anything special.

Q. Do you know how the sleeping apartments were arranged in that house—as to Mr. and Mrs. Sutton's and Mr. Kenyon's?

A. Yes.

Q. How were they?

A. Mr. Kenyon had the front room, and Mr. and Mrs. Sutton the back room on the second floor.

Q. The rooms were on the same floor?
A. The same.
Q. Were they connected?
A. Yes, there was a door between them.
Q. Do you know, from anything that Mr. Kenyon and Mrs. Sutton together have told you, or from anything that Mr. Kenyon himself has said to you, the reason for this arrangement of the sleeping apartments?
A. No. Do I understand "together" to mean when in the presence of the other?
Q. Yes?
A. No.
Q. Do you mean "No to both parts of the question?
A. I mean that there never was anything said to me when the two were present, touching this point, that I remember.
Q. Or when Mr. Kenyon was with you alone?
A. I do not recall anything.
Q. Who was Mr. Kenyon's housekeeper that winter?
A. Mrs. Sutton.
Q. Do you now recall how many winters they resided in that house?
A. I think that was the third.
Q. During each of these winters who was Mr. Kenyon's housekeeper?
A. Mrs. Sutton.
Q. Do you know whether Mr. Kenyon needed any nursing or care by reason of being indisposed during either of the three win-
215 ters that they resided there—any portion of the time?
A. If by that you mean being especially an invalid, I should say no.
Q. I mean as to the fact; do you know whether he did need care or nursing by reason of his condition?
A. I do not recall.
Q. You do not know?
A. No, sir.
Q. Did you ever hear Mr. Kenyon, in conversation, say anything about a place called the Breck place at Oconomowoc?
A. I say no, as far as Breck is concerned—I do not remember that name—but about the place, yes. The term "Breck" I do not recall.
Q. When did you hear him talk about a place at Oconomowoc?
A. The winter before his death, I think.
Q. Where were you then?
A. At his house.
Q. Who else was there?
A. Mr. Sutton and Mrs. Sutton.
Q. Were you all together?
A. Yes.
Q. What was the subject of conversation?
A. Plans for a house on the place.
Q. Were their plans there?

A. Yes.
Q. Who had them?
A. Mr. Sutton.
Q. Was it then and there said who made the plans?

(Objected to as leading.)

A. Yes.
Q. Who was it said then and there did make the plans?
A. Mr. Sutton.
Q. What was said by them in your presence and in their presence, about the plans, or either of them?
A. The matter of detail—interior arrrangement—was the subject under consideration.
Q. Was it said for what the plans were?
A. For a house.
Q. To be built where?
A. At Oconomowoc, on this place which had been spoken of.
216 Q. Did the plans indicate a large house or a small house?
A. I should say a large house.
[Q.] Was it said whose that was that they were building?

(Objected to as leading. The witness should be called upon to state what the general conversation was.)

A. I do not recall whether it was in so many words, but the tenor of the conversation was that it was to be built as Mrs. Sutton wanted it. If she wanted anything changed in the interior arrangement, it was to be changed. "Have it just at you want it," said Mr. Kenyon.
Q. What was said specially, if anything, about the arrangement of the house?
A. At this particular conversation the point was closets, doors, stairs; perhaps halls might come in.
Q. What did Mr. Kenyon say about the plan?
A. "Arrange it within as you choose."
Q. To whom did he address that remark?
A. Mr. Sutton was sitting there with the plans before him on the table; Mrs. Sutton was there and myself, and we were studying the plans—the arrangement of them—together.
Q. Did Mr. Kenyon say anything about the arrangement of the bed-rooms in the new house to be built there?
A. I recall nothing.
Q. Did Mr. Kenyon say anything further about the erection of the house; or did he say anything about the use to which it was to be put, or anything of that kind, that you now recall?

(Objected to as leading, and that the witness should be asked generally what the conversation was.)

A. I recall nothing.
Q. Did he say for whom the house was to be built?
217 (Objected to on the same ground, and that the witness had already stated that he had no knowledge on that point.

A. I do not say that I have not any knowledge, but that Mr. Kenyon did not then and there say.

Q. Have you any other knowledge, apart from that particular conversation, about that house or place at Oconomowoc?

A. Yes.

Q. What is the source of that knowledge?

A. I have heard Mr. Kenyon speak of going to build this house, or a house; I have heard Mr. Sutton speak the same, and Mrs Sutton. speak of it.

Q. What have you heard Mr. Kenyon say about this house at any other time then the time to which you have already testified?

A. All that I recall of hearing him say was at this time; perhaps not at this particular point of time when we were around the table; but during that winter it was more than once the subject of conversation—the plans were, and the house to be built; and I think more than once I have heard him say what I have mentioned; that "you can have it as you want." Not only the interior but the exterior seemed to have been all fixed; there did not seem to be any criticism on the general line of that; but the interior part of it was the subject of this particular conversation.

Q. When, in those conversations, he used the phrase "You can have it as you want"—to whom was that addressed; who was meant by "You?"

A. Mrs. Sutton.

Q. Were you ever at Oconomowoc?

A. No.

Q. Have you any other knowledge derived from Mr. Keynon concerning this matter in dispute between the parties to this controversy that you now recollect?

A. I do not recall anything.

Q. You spoke of having had some conversations with Mr. Sutton and with Mrs. Sutton; were those in the presence of Mr.
218 Kenyon? I mean were those in the presence of Mr. Kenyon, and were they other than the conversations concerning which you have already testified?

(Objected to on the ground that the witness has already stated that the conversation which he recollected as having had with Mr. Kenyon when Mr. and Mrs. Sutton were present was a conversation which he has now detailed, and which took place at the house when the plans were spoken of.)

A. No.

Cross-examination by Mr. ERASTUS F. BROWN:

Q. Referring to the time when you were called in to attend Mr. Kenyon in his last sickness, please state who were present at that time, during that evening, if you recollect.

A. Other than those mentioned?

Q. State whom and all.

A. There was Miss Maria Kenyon—I think I saw her there; and I think Miss Lizzie Kenyon—I cannot say now—my impression is,

Mrs. Brown; the sisters, one or more of them. I cannot say whether they were all three there or not, and yet they might have been all there.

Q. You were there from time to time, as I have understood from your testimony, from the time he was first taken sick to the time of his death?

A. Yes.

Q. Who were present there doing that period, from time to time—mention the names of any that you can call to mind?

A. Dr. Brockway, Dr. Freeman, Mr. Kenyon's sisters, his nephew, Frank. A. Kenyon. I cannot recall every one; I remember those; there might have been others; I presume there were.

Q. What service, if any, was rendered by those various persons then present, not including the doctors whom you have mentioned.

(Objected to as irrelevant.)

219 A. Let me understand—meaning the entire list of those mentioned—Mr. Sutton, Mrs. Sutton, Miss Kenyon, Mrs. Brown? Is that what I understand?

Q. Yes; what service was rendered by the various persons?

A. Mrs. Sutton sat by his bedside almost constantly—was on her knees on the floor, I believe, or sitting down by him, when I went in; Miss Maria Kenyon, I think, rendered some service—some little thing—when I was there; so did Mr. Frank Kenyon, in something that we had to do—help to turn Mr. Kenyon, or something of that kind; and all those little things that a friend could so readily do was done by them as best they could.

Q. When you stated on your direct examination that Mr. and Mrs. Sutton were there during this period it was not your intention to say that no assistance was rendered by any one else?

A. No.

Q. During this period of four days of his sickness these various persons you have referred to were present, were they not, the greater, if not the entire, portion of the time?

A. As I remember some one of them, I should say, was there; they were out and in; I kept no record, and did not charge my mind with it, but I remember they came in and out, and if there was anything they could do they were ready to do it.

Q. The case at that period of time was so desperate that really much assistance could not be rendered; is that so?

A. It was not a hopeful case.

Q. State, if you please, what service was rendered by Mr. and Mrs. Sutton during those four days.

A. Mrs. Sutton, as I have stated, was by his bedside, you might say, constantly, with very lttle exception, during the entire time; I remained there three nights; Mr. Sutton was not there so constantly; Mrs. Sutton was his nurse, and whatever special di-
220 rections were given were given to her, though there were some things done by others.

Q. What was the character of Mr. Kenyon's sickness?

A. There was no autopsy, but I should consider that there was

serious trouble, had been for years, in the head, pertaining to probably one of the arteries, which finally gave way, and which was the cause of his death; the symptoms pointed to that; the headaches, &c., which he had were indicative of a trouble not of recent origin.

Q. In your professional practice you have been called in a number of times to attend such cases?

A. I have.

Q. Is it not a fact that many who have had attacks of a like character have been, during their previous lives, and up to the period of such attack, strong and hearty men, apparently?

A. That such cases occur, and then are taken and die suddenly? Oh, yes, of course.

Q. So the fact of such a death by appoplexy, I think you said, would not militate against the fact that during the previous life of the person who had such an attack he was, to all appearance, hale and strong, and able to attend to his daily calling and daily business like other men?

A. We know that it is a fact.

Q. How long have you been acquainted with Mr. Kenyon?

A. About thirty-five years up to that time.

Q. You were on intimate terms with him?

A. Yes, I suppose I might say so; not the closest intimacy, but neighborly.

Q. You are a brother-in-law of Mr. Sutton?

A. Yes.

Q. You were associated with Mr. Kenyon, were you not, for a time, as an officer of the Harlem Savings Bank?

A. Yes.

221 Q. Had you ever, during your long acquaintance with Mr. Kenyon, been called to attend him previous to this time?

A. No.

Q. During these three years in which he resided in the winter season in New York he resided at 308 East 124th street.

A. I think that was the number.

Q. And the number of your residence?

A. No. 234 East.

Q. On the other side of Second avenue?

A. Yes.

Q. Up to how late a period did Mr. Kenyon act as an officer of the Harlem Savings Bank?

A. I cannot give you the exact time, but some time; some two or three years before he resigned; it might have been three or four years before that he resigned. Before that he was a nominal officer only.

Q. During the time that he was connected with that bank did he, to your knowledge, perform any service there?

A. He performed some—yes.

Q. In the making up of accounts that is so, is it not?

A. I would see him at a table with books, along with the president; I suppose they were going over the accounts—perhaps making up the dividends and interest; such things as pertained to the duties

of his office, and yet it was mainly done by others.

Q. Of your own knowledge do you know the fact of Mr. Kenyon being confined to the house—to his house in Harlem—by sickness previous to his last sickness?

A. No. By that I mean sickness so as to need medical attendance. I have heard him speak of being ill and being kept in a day or two; have heard himself speak of that; when I have missed him and made inquries after his health he would say, "I have not been very well"—"I have been home."

Q. Were you able to judge from the statements made to you at that time that his sickness was not serious, but that he was indisposed with headache?

222 A. I have heard him speak several times of his head troubling him very much, and I have asked him why he stayed west rather than in Harlem, and he said he could sleep better there.

Q. Was your acquaintance sufficiently intimate with Mr. Kenyon to know whether he was during the day, and at night oftentimes, alone in going to and fro from his house and other places?

A. Yes.

Q. What is the fact—you met him oftentimes alone on the street?

A. Oh, yes.

Q. During the day and at night?

A. I cannot say as regards night, but during the day I have known of his going around a few years before his death.

Q. Frequently up to the time of his death?

A. I do not know how frequently, but occasionally I would meet him and know of his going.

Q. Have you ever noticed anything in Mr. Kenyon's bearing or his apparent state of health during the time that he was so absent alone that would lead you to think that he needed the care and attention of some one to assist him in his goings thus to and fro?

A. A man having an attack as he did a few years before ought not to go very far alone at any time, especially in the physical condition in which he was, suffering so long as he had been, and continued to, from his head. Of this he has spoken to me a number of times—shaking his head, "So much pain;" he said it hurt him.

Q. Is it not your experience as a physician during the years of your practice that many men who have been able to attend to their business, and did not need care and attention, suffered from pain in their head to a greater or less extent?

(Objected to as irrelevant.)

223 A. From what Mr. Kenyon had said to me I considered the cause of the pain in the head different from ordinary headache, which so many people have at times and which passes off. That is the way it impresses me, and had so done for years, and more especially by reason of what he had said, that he could not sleep at night, and would lie awake for many hours—my impression was—and perhaps for all night, sometimes, or nearly so; he was not a man that was apt to say a great deal, but sometimes in speaking with me he did speak this.

Q. Did not Mr. Kenyon, from the time of your acquaintance with him up to the time of his last sickness, appear to be an active man?

A. Active; yes.

Q. Do you know whether his state of health was such during the time that he resided in New York, in the winter, that he was unable to attend to his various engagements?

A. I do not know that.

Q. Do you know of any care and attention that Mrs. Sutton gave to Mr. Kenyon previous to his sickness—I now refer to your own knowledge—from the time you knew him—based on what you have seen and know, and not upon other persons' statements?

A. From what I have seen those winters that they resided here in New York, on 124th street, I had considered that Mrs. Sutton was looking after his wants, as a daughter would look after the wants of a father, whether they were of the character of a sick or well —, or between; it seemed to be her care to do so—her purpose to do so.

Q. She was a member of his household there?

A. Yes.

Q. And attended to all matters that would devolve upon a lady in that capacity?

A. So far as I ever saw.

224 Q. You know from your acquaintance with Mr. Kenyon, and from your acquaintance, I judge, with his property and business, that he had many things to attend to while in Harlem, in the way of looking after his real estate, and collecting his rents, and attending to various other matters?

A. I suppose he did, so far as I know. I did not know that he did it, yet I supposed that he did.

Q. Do you not know the fact that he died possessed of bonds of various companies?

A. I understand so.

Q. Do you know whether any one attended to the collecting of his moneys—dividends and interest—save himself, while he was in New York.

A. I do not.

Q. Your impression is, from all you know, that he did attend to it himself?

(Objected to.)

A. I know nothing to the contrary.

Redirect examination by Mr. WESTOVER:

Q. Was Mr. Kenyon a member of church?

A. Yes.

Q. Of what church?

A. The Harlem Presbyterian Church.

Q. Who was the pastor of that church?

A. Rev. J. S. Ramsay.

Recross-examination by Mr. ERASTUS F. BROWN:

Q. He was a member of the board of trustees of that church, and also a member of the session?

A. Regarding his being a trustee, that I know from his having told me; but as to the session I do not know.

Q. Do you know of the fact that during the time he was in New York, while he was a trustee, he attended at night the various sessions of the board and transacted business there and returned to his home, unaccompanied?

A. I do not know.

(By consent, the signature of the witness is waived.)

225 CAROLINE M. HILLS, being duly sworn and examined, testified as follows:

Direct examination by Mr. WESTOVER:

Q. You are the wife of the witness who has just testified, Doctor Hills?

A. Yes.

Q. And I believe you are a sister of Mr. Chas. T. Sutton?

A. Yes.

Q. Are you acquainted with Mrs. Sutton, the complainant in this proceeding?

A. I am.

Q. Have you known her for many years?

A. Yes.

Q. How long have you been acquainted with Mr. Kenyon, the deceased?

A. I cannot state the exact number of years, but about 35 I should think; somewhere near there.

Q. He was formerly for many years a resident of the city of New York, or of Harlem, was he not?

A. Yes.

Q. Do you know anything about where his summer residence has been for many years?

A. Yes, the last many years of his life.

Q. Where has he spent a portion of his time, outside of New York, if you know?

A. In Oconomowoc, Wisconsin.

Q. Do you know when he first commenced to go to Oconomowoc?

A. I do not remember.

Q. About how many years in your estimation, without remembering exactly?

A. I could not tell.

Q. Well, it is several years?

A. Yes, a number of years.

Q. Do you know at whose house—with whom he staid and lived while at Oconomowoc?

A. The first summers?

Q. Yes, at any time that he has been there?

A. In Mr. Westover's house some parts of the time.

226 Q. Were you yourself at Oconomowoc?

A. Yes.

Q. Have you ever seen Mr. Kenyon there?

A. Yes.

Q. Where were you, then, when you saw him there?

A. At Mrs. Sutton's.

Q. Mrs. Sutton was then keeping house there?

A. Yes.

Q. Where did she live in Oconomowoc?

A. On the main street.

Q. In what kind of a house was that?

A. It was a cottage.

Q. A small cottage?

A. A small cottage.

Q. Do you know this place that is in dispute in this suit that is called here the "Breck" place—the Oaks?

A. Yes.

Q. You know the place?

A. I have been there.

Q. When were you there—what year?

A. Some five years ago.

Q. Do you know where Mr. Keyon spent the winters—the winter of his death and the two winters previous to his death?

A. In Harlem.

Q. At 308 East 124th street?

A. Yes.

Q. With whom did he reside, or who resided with him there?

A. Mr. and Mrs. Sutton.

Q. Who was the housekeer there?

A. Mrs. Sutton.

Q. How near them did you reside?

A. On the next block.

Q. Were you a visitor at that house during those winters that they resided there?

A. Yes.

Q. How frequently were you there on an average?

A. Well, I was there several times a week, and sometimes more.

227 Q. When you were at Oconomowoc and Mr. Kenyon was there, do you know whether Mrs. Sutton rendered him any particular service at that time?

A. In what way?

Q. In any way—do you know whether she did at all?

A. He was sick once when I was there.

Q. What did she do?

A. She attended to him—to his wants.

Q. How was he sick, or how did he complain?

A. He complained of his head.

Q. How sick was he?

A. He kept his bed one day; I do not know whether longer, but it was one day any way.

Q. Do you know whether any physician was called at that time?
A. I do not remember.
Q. How long were you there at Oconomowoc?
A. Two months.
Q. Was Mr. Kenyon there the whole of the time that you were there?
A. No; he went to New York once.
Q. Was he there when you arrived in Oconomowoc?
A. Yes.
Q. Do you know in what month that was?
A. It was in August.
Q. You cannot tell the year exactly?
A. Yes; it was in 1878; it is five years ago this coming August.
A. Did Mr. Kenyon have a stroke of appoplexy that year that you know of?
A. I do not know.
Q. Do you know whether while he was there and you were there he was sick more than once?
A. I do not remember. He complained of his head a number of times, but I do not remember of his being confined to his bed.
Q. Sometimes when he complained of his head troubling him, and he did not go to bed, what did he do?
A. He would lie down for a short time, or sit in a rocking-chair.
228 Q. Would he lie on a sofa or lounge?
A. Yes; and sometimes on the bed.
Q. Or sit in the rocking-chair?
A. Yes.
Q. Did he treat his head in any way at those times—put anything on it?
A. I do not remember.
Q. Have you seen him or heard [him] complain during the winters that they resided in New York?
A. The last three winters of his life?
Q. Yes.
A. Yes.
Q. What complaints have you heard him make then?
A. Of his head.
Q. How often?
A. Frequently.
Q. What did he do for it; do you know?
A. I do not.
Q. Do you know whether he was confined to his house or not by reason of those afflictions?
A. I do not remember.
Q. Did you hear him say anything about having had in 1878 or 1879 a stroke of appoplexy?
A. I have heard him say that he had had a severe attack of sickness.
Q. What did he say about it?
A. I do not remember.

Q. Did you ever hear him say about any apprehensions he had or fears arising from his sickness?

(Objected to as leading.)

Q. Do you recollect his final sickness?
A. Yes.
Q. Do you know what time of day it was that he was stricken with his final sickness?
A. It was in the evening.
Q. Did you hear of it in the evening?
A. Yes.
Q. Did you go to the house?
A. Not that night.
Q. When did you go?
A. Next morning.
Q. How often were you there during his final sickness?
A. I was there each day.
229 Q. Much time?
A. Some time; not very long at a time.
Q. Sometimes you were there more than once a day?
A. Yes.
Q. Who was his nurse during his sickness?
A. Mrs. Sutton.
Q. What did she do for him; how did she tend to him?
A. I saw her sit by him attending to the instructions of the physicians.
Q. Did you hear any physicians giving her instructions?
A. I did.
Q. Who were the physicians whom you heard giving her instructions?
A. Dr. Hills and Dr. Freeman.
Q. Do you recollect when Dr. Freeman was called?
A. I do not?
Q. You saw him there?
A. Yes.
Q. Did you have any conversations with Mr. Kenyon or with Mrs. Sutton in Mr. Kenyon's presence, during the last two or three years of his life, relative to that "Breck" place in Oconomowoc?
A. Regarding plans?
Q. Did you have any conversations?
A. I was there at the house when they were making the plans.
Q. At which house?
A. In 124th street, in this city.
Q. During the winter, when they were making the plans?
A. Yes.
Q. Who was working on those plans?
A. Mr. Sutton.
Q. They were being examined, you say, when you saw them?
A. Yes.
Q. Who was present?

A. Mr. Sutton and Mrs. Sutton and Mr. Kenyon, and I think, at one time, Dr. Hills.

Q. Did you enter into conversation with them more than
230 once that winter on that subject?

A. Yes, in regard to the plans.

Q. The plans of the house to be built, you mean?

A. Yes.

Q. What at any time did you hear Mr. Kenyon or Mr. Sutton, or Mrs. Sutton in Mr. Kenyon's presence, say with regard to that?

A. I heard Mr. Kenyon say he wanted the house to be built to suit Mrs. Sutton.

Q. Did you hear any particulars about the plan?

A. About the arrangement of the rooms?

Q. Anything particular about the arrangement of the rooms—or any reasons?

A. I do not remember.

Q. Do you know how the sleeping rooms occupied by Mr. and Mrs. Sutton were arranged in the cottage at Oconomowoc when you were there, and how the sleeping room of Mr. Kenyon was?

A. Mr. Kenyon's room was back, on the second floor, and Mr. and Mrs. Sutton's was front, in the wing; not directly opposite—in the corner.

Q. How far apart?

A. A short passage apart.

Q. A few feet, more or less?

A. Yes; I could not tell exactly the length, but a short passage-way.

Q. What room did you occupy there?

A. The front room; Mr. Kenyon's was back.

Q. That was five years ago?

A. Five.

Q. Do you know whether they made any change after that in the arrangement of their bed-rooms there?

A. I do not know of my own knowledge.

Q. Did you or not hear anything said about how the things should be arranged in the new house when talking about the plans?

A. I may have; I do not remember.

Q. Was anything said about whose house that was?

(Objected to as leading.)

231 A. I have heard it said; I never heard Mr. Kenyon say it.

Q. Have you heard it said in Mr. Kenyon's presence?

A. No.

Cross-examination by Mr. ERASTUS F. BROWN:

Q. You have spoken of your sojourn in Oconomowoc, and of Mr. Kenyon's being there but a portion of the time, and of his leaving before the end of your visit there for New York. Please state, if you are able, who accompanied him to New York, if any one.

A. I do not know.

Q. You were present on the day of his leaving?

A. Yes.

Q. From your knowledge, based upon the conversations of those who were present at the time of his leaving, and from the statements of Mr. Kenyon in their presence, do you, in your mind, arrive at the conclusion that he went to New York alone?

(Objected to as calling for a conclusion.)

A. Yes.

Q. Mr. and Mrs. Sutton remained there with yourself?

A. Yes.

Q. Is it not a fact that during the period that Mr. Kenyon resided with Mr. and Mrs. Sutton at Oconomowoc he paid board to them or to Mrs. Sutton?

A. Do I know that?

Q. Yes?

A. I do not.

Q. Do you know anything at all on that subject?

A. Only what I have heard.

Q. During the time that you were there, for those two weeks, please state how Mr. Kenyon was engaged if you are able to state?

A. He was usually in the house, mornings, and then he would take a walk, and sometimes go on the lake. I do not think I
232 ever saw him employed in any labor of any kind.

Q. Who accompanied him, if you know, during the time that he was out and around, if any one?

A. Well, sometimes Mr. Sutton went with him; sometimes Mrs. Sutton went with him; sometimes he went alone; but he was never alone on the lake.

Q. Do you know the fact that Mr. Keyon contributed largely to the support of the family while he resided with Mr. and Mrs. Sut on at Oconomowoc?

A. No.

Q. What was Mr. Sutton's condition of health at that time, if you know?

A. Well, he was able to be around and working some of the time—most of the time.

Q. He was an invalid, was he not, during that period?

A. Yes.

Q. Was not Mr. Sutton's state of health apparently more critical than Mr. Kenyon's during that period?

(Objected to as immaterial, and on the ground that this witness is not an expert.)

A. Well, at that time his health was better; I could not say.

Q. He, during that period, suffered from a local trouble of the lungs, did he not?

(Objected to as immaterial.)

A. He had a difficulty, either of the lungs or of the liver.

Q. How did it manifest itself?

(Objected to as immaterial.)

A. He would cough.

Q. The coughing was very severe, was it not?

(Objected to as immaterial.)

A. He coughed a great deal, nights.

Q. His life was despaired of, from time to time, during this period, was it not?

(Objected to as immaterial.)

233 A. Not during that period.

Q. I refer now to the period from the time when Mr. Kenyon first removed to Oconomowoc, not including the period that he resided with Mr. Westover, but from the time he moved into the house which Mr. and Mrs. Sutton occupied down to the year 1882?

(Same objection)

Q. Do you mean had frequent illnesses?

Question repeated.

(Same objection.)

A. He had several severe fits of sickness, but I do not think his life was despaired of during this period.

Q. But his condition of health was such that it was not judged that he would live many months or years. Is not that the fact?

(Same objection.)

A. I do not know how to answer that question.

Q. Mr. Sutton, during this period, required a great deal of care and attention on the part of Mrs. Sutton, did he not?

(Same objection.)

A. Yes, during those sicknesses.

Q. Do you know who supported the house during this period, when Mr. and Mrs. Sutton resided together at Oconomowoc—I mean who supplied the means for provisions, etc.?

A. Yes.

Q. Please state, if you know?

A. Mrs. Sutton took boarders; Mr. Sutton was occupied in building boats and sailing them and renting boats.

Q. You have stated that Mr. and Mrs. Sutton took boarders. Is it not a fact that Mr. Kenyon was one of those boarders during that period?

A. I suppose so.

Q. Referring now to the period in January, 1882, when Mr. Kenyon died, you have stated in your direct examination that
234 Mrs. Sutton was his nurse. Do I understand you correctly as having so stated on your direct examination?

A. Yes.

Q. When you say that Mrs. Sutton was his nurse during that period, from the time he was first taken sick or stricken down, to the

time of his death, do you mean to be understood as saying that Mrs. Sutton alone attended to his wants and cared for him?

A. I didn't see any one else do anything for him, excepting the physicians and Mrs. Sutton at the times that I was there.

Q. Please state how often you were there, and how long you remained at any one time?

A. I was there each day; sometimes twice.

Q. For how long a period?

A. It varied. I was there several hours some days.

Q. Did any of those there present besides Mrs. Sutton attend in any manner to him? If not, how were they engaged and occupied during the period that you were there, and how did their engagements and occupations differ from the engagements and occupations of Mrs. Sutton at that time?

A. Well, they were sitting there; they were not doing anything, that I saw, excepting sitting.

Q. The most of the service and labor that was performed at that time was performed by the doctors who were there, was it not?

A. I saw Mrs. Sutton—

Q. And Mr. Sutton?

A. Yes, and the doctors.

Q. The service which he required at that time, as far as your observation aids you, was that service that could be better performed by men than by females? It was lifting and moving, was it not?

A. I saw him moved once. I don't remember seeing him moved more than once, though his head I saw moved.

235 Q. Who attended to the moving of Mr. Kenyon during that period, as far as your observation aids you?

A. I don't remember; I saw him moved.

Q. He really at that time, as far as you could judge, was in such a condition that he didn't need or receive any stimulant or any food; how is that?

A. There was something given to him; I don't know what it was.

Q. Was this given to him by any one of the doctors present at any time?

A. I don't remember.

Q. By whom was it given, if you know?

A. I don't remember.

Q. A former witness, Dr. Hills, has testified that Mrs. Sutton, during this period, the greater part of the time, was seated by the bedside of Mr. Kenyon; that is a fact?

A. Yes.

Q. Is that a fact?

A. When I was in there I saw her sitting there by him.

Q. Please state how she was engaged there while so sitting.

A. I saw her wetting his mouth and his head.

Redirect examination by Mr. WESTOVER:

Q. You have testified that you saw his head frequently moved during his sickness; who moved his head during that sickness?

A. I think Dr. Hills did; I don't remember who else?

Q. Is Mr. Sutton dead or is he alive?
A. My brother?
Q. Yes.
A. To my knowledge he is alive.
Q. Is he sick or well?
A. He was neither sick nor well the last time I heard of him.
Q. When you were in Oconomowoc was he under the care of a physician?
A. I don't think he was under the care of a physician at all while I was there.
Q. What was he doing while you were there?
A. He was building a boat.
236 Q. How long did he work each day at building boats?
A. I could not say.
Q. Well, how much of the time was he at work?
A. Well, I should think he was two-thirds of the time.
Q. What else did he do?
A. He sailed boats and rented boats.
Q. Kept boats to let—for hire.
A. Yes.
Q. How many did he keep—do you know?
A. I don't know.
Q. Who went out sailing with Mr. Kenyon when he went?
A. I went with him, Mrs. Sutton went with him, and Mr. Sutton sometimes.
Q. How long is it since you have seen Mr. Sutton?
A. I saw him last fall.
Q. What was the condition of his health then?
A. He seemed pretty well.
Q. What has been the trouble or complaint, if any, of Mr. Sutton?
A. As I am informed, it is an abscess on the liver.

Recross-examination by Mr. ERASTUS F. BROWN:

Q. During the period that Mr. Kenyon and Mr. Sutton were in New York together, as far as your observation aids you, who was the most active, Mr. Kenyon or Mr. Sutton?

(Objected to as immaterial.)

A. Well, I should say they were equally so, as far as I could observe.

Redirect examination by Mr. WESTOVER:

Q. When Mr. Kenyon came to New York from Oconomowoc, in the fall previous to his death, did he come alone?
A. No.
Q. Who came with him?
A. Mr. and Mrs. Sutton.
237 Q. When he departed from New York in the spring previous to that, after having stayed here during the winter, who left with him?
A. I don't know.

Q. You do not know whether he went alone or whether Mr. and Mrs. Sutton went with him?

A. I don't remember.

Q. Do you know whether he came alone the fall previous to that; that is to say, in the winter of 1880–'81, the year previous to his death, who came with him from the West then, do you know?

A. I don't know.

Recross-examination by Mr. ERASTUS F. BROWN:

Q. Do you know that in the early part of September, if not in the very late part of August, in the year 1881, Mr. Kenyon came to New York previous to the time of Mr. and Mrs. Sutton's coming with him to New York?

A. I do not know.

(By consent, the signature of this witness is waived.)

NATHANIEL M. FREEMAN, being duly sworn and examined, testified as follows:

Direct examination by Mr. WESTOVER:

Q. Where do you reside?

A. At 222 East 87th street, in New York city.

Q. What is your occupation?

A. I am a physician.

Q. How long have you practiced as such?

A. 30 years.

Q. Did you know John S. Kenyon in his lifetime?

A. I did.

Q. Do you know the complainant, Mrs. Sutton?

A. I do.

Q. How long had you known Mr. Kenyon?

238 A. Not long. I had seen him but very few times previous to his last sickness.

Q. How long have you known Mrs. Sutton?

A. I have known her for 25 years or more; at least I have seen her occasionally and have known her.

Q. Do you recollect the final sickness of Mr. Kenyon?

A. I do.

Q. Were you called there?

A. I was.

Q. When?

A. He was taken sick, as I was told, on Thursday evening, and I was called in on Friday afternoon, next day.

Q. By whom were you called in?

A. I do not know who called me; that is, I do not remember; but I was called in consultation with Dr. Hills.

Q. Do you recollect the day that Mr. Kenyon was taken sick?

A. I do.

Q. Do you know the day of the week?

A. I do.

Q. What day was it?

A. Thursday.
Q. Did you see him that evening, prior to his sickness?
A. He took dinner with me that day.
Q. Where?
A. At 222 East 87th street.
Q. Was your wife present then?
A. She was.
Q. And were other members of your family present?
A. Yes; there was a tableful of them.
Q. Was any person there with Mr. Kenyon that evening?
A. Mr. and Mrs. Sutton.
Q. Was Mr. Sutton there?
A. Well, I am trying to think. I know that Mrs. Sutton was there; I would not be positive about Mr. Sutton.
Q. When did Mr. Kenyon leave that house that night?
A. Well, I should suppose it was somewhere about half-past nine or something like that.
Q. Were you there when he left?
A. I think I was.
239 Q. Did he leave in company with any person?
A. He did.
Q. Who went with him?
A. My impression is that Mrs. Sutton was with him. I can't recall; my impression is that Mr. and Mrs. Sutton were both with him, but I would not like to be very positive about it.
Q. You are not quite positive that Mr. Sutton was with him?
A. No; I am not positive about that. I have not thought of it since. It passed from my memory.
Q. When did you next see Mr. Kenyon after he left your house that evening?
A. I saw him the next afternoon.
Q. That was after he was taken sick?
A. Yes.
Q. At his house?
A. At his house.
Q. Who was there?
A. Dr. Hills was there; Mrs. Sutton was there; some of his sisters—Mr. Kenyon's sisters—were there; I couldn't tell how many or their names.
Q. In what condition was Mr. Kenyon when you were called to the house?
A. He was laboring under an attack of apoplexy. He was unconscious; lying on his bed in the back parlor.
Q. How long did you remain there?
A. I don't remember how long. I remained there quite a little while.
Q. At what time of day did you go there?
A. I could not tell the hour, but it was in the afternoon some time.
Q. Were you there any more after that, previous to his death?
A. I was there a number of times after that.

Q. Were you there at the time of his death?

A. I think not; that I would not be positive about; I was
240 there a good deal; if I was not there at the time, I was there very shortly after.

Q. Who was acting as his nurse when you were there during that sickness?

A. Mrs. Sutton, as I understood it.

Q. Did you give any directions to any person concerning him?

A. I was consulting physician, and all my suggestions were to Dr. Hills.

Q. And directions as to his treatment were given by Dr. Hills?

A. Yes.

Q. Was there any other physician there that you know of?

A. Dr. Brockway was there.

Q. Did you see him there?

A. Yes.

Q. Was he there for consultation?

A. He was.

Q. Did he attend more than once, or don't you know?

A. Oh, yes; he was there a number of times. I couldn't tell how many times, but he was there a good many times.

Q. Was he there as consulting physician, the same as you?

A. I understood it so; yes, sir.

Q. Did he make his suggestions also to Dr. Hills?

A. I presume he did; that is the custom.

Q. How long previous to that final sickness did you know Mr. Kenyon?

A. Well, I really couldn't tell; I don't suppose I ever saw him more than a dozen times in the course of my life previous to that sickness. I saw him very little. I knew him as a speaking acquaintance, but that is about all.

Q. Your acquaintance with him previous to that sickness is not sufficient then to base an opinion upon as to his condition prior to that sickness?

A. Oh, not at all.

Q. Suppose that Mr. Kenyon, in the summer of 1878 or 1879,
while in the West suffered a stroke of apoplexy, which con-
241 fined him to his room or bed for some weeks, during which time he was either unconscious or semi-unconscious; suppose that after that stroke of appoplexy he had complained of sleeplessness—of frequent sleeplessness—or insomnia, and had complained of pains in the head; that he had severe attacks of headache, occurring on an average as often as once a week, sometimes twice a week, sometimes once in a few weeks; that some of those attacks were so severe as to confine him to the house and necessitate medical attendance; that this condition of health continued up to the time that Mr. Kenyon came to New York in the fall of 1881, and that after leaving your house on the day that he made his last visit, and within the space of half an hour or thereabouts, he was again struck with the sickness under which you found him laboring when you were

called. If such were the facts, would it be prudent to leave him without attendance to go about alone, by day or by night?

(Objected to on the following grounds:)

First. That it is not based upon a state of facts which has been presented in the evidence thus far.

Second. That the witness was not present in the court during the examination of the witnesses, so as to enable him to have heard the depositions which were taken, and upon which the question is based.

Third. That the question is based upon an assumed state of facts.

Fourth. That it appears from the statement of this witness himself that he had not sufficient knowledge of Mr. Kenyon's state of health to enable him to give an opinion, for that he was not present during the taking of the testimony upon which the question is alleged to have been based.

Fifth. That the question contains many statements which
242 are not in evidence in the case, and that it omits many facts which are in evidence in the case in the depositions so far taken.

A. Assuming the facts stated in that question, I should say it was highly improper for him to go alone any very great length of time or any great distance. He should be continually watched, as I should suppose there would be danger at any time of the attack recurring.

Q. Did you ever have any conversation with Mr. Kenyon previous to his last sickness as to his condition of health?

A. No, sir; never.

Q. Did you ever visit their house on 124th street?

A. Yes.

Q. When were you there?

A. I cannot tell the date. I was there a number of times in the course of the winter—the winter of his death.

Q. Were you there the previous winters?

A. I presume I was, but I couldn't say positively. I have no doubt that I was there.

Q. When you were at that house on any of those calls, did you hear anything said by Mr. Kenyon, or in his presence, about this Oconomowoc property that is in dispute here?

A. I heard considerable about the Oconomowoc property, but I don't think I heard it in Mr. Kenyon's presence.

Q. Or from him?

A. Or from him; no.

Q. Did you at any time?

A. No, sir; I don't think I did.

Q. Did they ever show you their plans of the house?

A. I have seen the plans, but I don't think Mr. Kenyon was present when I saw them.

Cross-examination by Mr. ERASTUS F. BROWN:

Q. Were you present at any of the times and during the

243 times when the depositions of witnesses have been taken in this case other than to-day?

A. Never.

Q. Then when you gave your answer to the hypothetical question put to you on your direct examination, you base your answer entirely, do you, on the statement which has been made by Mr. Westover, who represents the complainant here?

A. I base it entirely upon the statements contained in the question.

Q. Was the gathering at which Mr. Kenyon was present on the evening of his sickness an invited company?

A. I could not say. My memory with regard to these kind of particulars is very defective. I really cannot say who was present, only I know there was a tableful of them; but Mrs Freeman will tell you every one that was there.

Q. Please state who were present.

A. I could not do it; I know there was a tableful, but I would not pretend to say all that were there.

Q. But Mr. Kenyon was there?

A. He was there; that I know, because he sat next to me at the table.

Q. Can you say during what time in the afternoon he arrived there?

A. I could not, because I do not think I was there myself when he arrived. I presume I was not.

Q. Were you there during the time that he was seated at the table?

A. I was there at dinner; yes.

Q. Did you observe anything strange in his appearance or manner at that time?

A. I observed nothing strange at all.

Q. He ate heartily?

A. As far as I can remember, he seemed to enjoy his food; he was jovial and happy.

Q. Were you there through the evening?

A. I was.

Q. At what time did he leave?

244 A. I think he left somewhere in the neighborhood of half-past nine—somewhere about that.

Q. And his manner at the time of leaving was like his manner during the evening at the table?

A. I do not remember any particular difference.

Q. You have been a practicing physician for some years?

A. Yes.

Q. You have heard the testimony of Dr. Hills, who was examined here to-day?

A. No; I did not hear it fully; I did not get in until he had partly testified. I heard the latter part of his testimony; I did not hear the first part of it.

Q. The fact that one should be stricken down as suddenly as was Mr. Kenyon, and with the disease that struck him down—would

that militate against the fact that previous to that time he may have been apparently a man in good health, and able to attend to his business engagements and his duties; or, in other words, are not many men apparently in health and strength, who have not had sickness for years, suddenly struck down with the malady which struck down Mr. Kenyon?

A. There is always a first attack, and it is generally sudden.

Q. So that one may be struck down with such an attack even while actively engaged in business, and even actively engaged up to the very day of the attack, and even though they may have been for a long time previous actively engaged in attending to their concerns and affairs?

A. That is certainly possible.

Q. You have answered the hypothetical question based in part upon what Mr. Westover, representing the complainants here to-day, included in his question, in reference to an attack which Mr. Kenyon is alleged to have had some time previous in Oconomo-
245 woc. You know nothing of the attack of your own knowledge?

A. Nothing at all. I based my answer entirely on the question put.

Q. Did Mr. Westover, in his question, so clearly present the alleged facts in reference to that attack that, taking such facts in connection with the other facts contained in the hypothetical question, you are able to answer as to the condition of Mr. Kenyon at the time of the attack?

A. That hypothetical question assumed that there had been an attack of apoplexy; it also assumed a kind of congested condition of the brain; accounting for these continual headaches, two or three times a week or at more frequent or rarer intervals for a length of time, and, in my mind, a man who had had an attack of apoplexy, and had a condition of things existing in the brain which would produce headache such as this question assumed, would require great watchfulness.

Q. Then, in referring to headaches in connection with the conclusion at which you have arrived, do you mean to be understood as saying that the headaches were the outcome of the previous attack?

A. My idea is this: That the attack of apoplexy and the headaches that succeeded that attack were produced by the same cause.

Q. Is it, in your mind, based upon the hypothetical question that those headaches were the outcome and caused by the attack which he had continuing?

A. Let me understand your question.

Question repeated. A. There is a little difference, in my opinion, from what the question would assume. I think that the attack of apoplexy and the subsequent headaches were produced by the same
cause. I do not suppose the apoplexy caused the headaches,
246 or the headaches the apoplexy, but the same thing that caused the apoplexy caused the headaches, which was a congested state of the brain.

Q. And then, in your opinion, the headaches referred to in the hypothetical question may have been caused by some trouble which was subsequent to the apoplexy and not necessarily connected with the apoplexy?

A. They were connected as being both produced by the same thing.

Q. In other words, they were connected the same as two branches would be connected with the trunk of a tree?

A. Exactly.

Q. Then these subsequent headaches referred to in the hypothetical question may have flowed from an earlier trouble, and not from any condition caused by the early attack; how is that?

A. Well, I think it is all in the same line. If there was congestion of the brain, congestion of the head, it caused that early attack of apoplexy, and afterwards, in a less degree, caused the headaches; it was the same thing.

Q. Suppose that one had had attacks of headaches for many years previous to and up to the time of having such an attack of apoplexy as is referred to in the hypothetical question and continuing on, would you deem it then unsafe for such a person to have been alone during the previous years?

A. If a person had congestion of the brain—that is, an undue amount of blood—if the arteries in the brain were, in a certain degree, diseased, then, no matter whether the attack of apoplexy had come or not, I should think it very well to have that man carefully watched.

Q. If Mr. Kenyon had been troubled with headaches for many years previous to the attack of apoplexy, do you think that during those years he was in a condition of health which made it wise and well that he should have an attendant?

247 A. Well, if those headaches were caused by disease of the blood vessels of the brain, then he could not have been watched too closely.

Q. Is it not a fact that the brains of most men are to a greater or less extent so diseased?

A. Well, no; I do not admit that at all.

Q. If Mr. Kenyon had had headaches previous to his first attack, and if he had headaches after the attack, would his condition of health subsequently make it more needful and fit that he should have an attendant than it was previously?

A. I think so, decidedly. If the headaches had culminated in an attack of apoplexy that shows that he was subject to it and was liable to have another attack.

Q. It is a fact in your experience, is it not, that a great many, even of those whom you have attended because of their having an attack of apoplexy, having recovered, have gone forth from the effects of it, and have been, to all appearances, strong and able men, and have continued for many years active?

A. That is possible. The rule, I should say, on the whole, is that a man who has one attack is more liable to have another; we look for another, and unless precautions are taken against it it will almost invariably come. That is my experience.

Q. The fact of headache alone in no way indicates a congested state of the brain?

A. Oh, no; a simple headache every person may have.

Q. And persons, both men and women, may have headaches for years—from early years to middle life—without having a congested state of the brain?

A. Oh, certainly.

Q. And you would not assume, therefore, from the fact that a man had frequent headaches that he had that congested state of the brain.

A. Oh, no; the simple headache alone would not lead to that inference.

248 Q. There are many who are subject through life to sick headaches?

A. Yes.

Q. Is it constitutional with them?

A. Yes; this kind of headaches are more often caused by disturbance of the stomach than any other cause. They do not indicate any tendency to apoplexy, in my opinion.

Q. Do you think that the heartiness of Mr. Kenyon's appetite on the occasion that evening when he took dinner at your house had anything to do with the attack?

A. Well, no; I can hardly say; assuming that his stomach was a little out of order, then, taking into it more than it could digest, it would undoubtedly hasten any trouble about the brain that might have been existing before.

Q. Apoplexy, really, has its root, has it not, in the stomach?

A. Well, no; apoplexy is an overloading of the blood vessels of the brain. No; I would not say that it had its root in the stomach—although the connection between the stomach and the brain is exceedingly intimate.

By Mr. WESTOVER:

Q. Did you ever know a healthy man to die of apoplexy?

A. I never knew a man to die of anything but old age or accident.

By Mr. BROWN:

Q. But you have known many men apparently healthy and strong, as you have testified before, who have died of apoplexy?

A. Well, apparently; that is, a person that knew nothing about it, seeing them, would think they were in tolerable good health, yet all of a sudden they might fall, stricken with apoplexy.

249 By Mr. WESTOVER:

Q. Is apoplexy the beginning or the culmination of a disease?

A. Well, I should suppose it was a culmination; I should suppose the beginning of apoplexy is a weakened condition of the blood vessels and a little oozing of blood into the cavity of the cranium, producing congestion, and, so, apoplexy.

Q. How long does that condition of the brain ordinarily continue previous to an apopletic stroke?

A. I do not know of any rule; sometimes it comes very suddenly, and sometimes it is a long time in coming.

Q. After an apopletic stroke, and previous to a second apopletic stroke, which proves fatal—that is, between the two strokes—does that condition of the brain continue or not?

A. Most undoubtedly, in my opinion.

Q. Well, are there to be found by physicians learned in the profession symptoms of that condition of the brain during that period?

A. I should say so, decidedly.

By Mr. BROWN:

Q. One may have an attack of apoplexy and recover from it and die of old age, may they not?

A. Well, that is among the possibilities, yes; I should hardly think it probable, though.

By Mr. WESTOVER:

Q. Mr. Kenyon did not die of old age?

A. No.

By Mr. BROWN:

Q. A man may recover from it and be active?

A. Well, it is possible.

(By consent the signature of the witness is waived.)

VESTIANA Q. FREEMAN, being duly sworn and examined, testifies as follows:

250 Direct examination by Mr. WESTOVER:

Q. You are the wife of Dr. Freeman, who has just testified, I believe?

A. Yes.

Q. You reside at 222 East 87th street?

A. Yes.

Q. How long have you resided in that house?

A. 32 or 33 years.

Q. Did you know Mr. John S. Kenyon in his lifetime?

A. Yes.

Q. How long had you known him?

A. Ever since I can remember; I did not know him intimately only within the last few years.

Q. Do you know Mrs. Sutton, the complainant?

A. Yes.

Q. How long have you known her?

A. Pretty nearly since she was born.

Q. I believe that her mother and your mother were sisters?

A. Yes.

Q. Do you know Mr. Sutton?
A. Yes.
Q. You have known him for several years?
A. About 40 years, I should say, if not longer.
Q. Do you recollect the place where Mr. Kenyon and Mr. and Mrs. Sutton resided in the winter of 1881–'82?
A. You mean up in Harlem?
Q. Yes.
A. Yes.
Q. They were there also in the winter previous to that—the winter of 1881?
A. Yes.
Q. And a portion of the winter previous?
A. Yes.
Q. Do you know where they were in the summer months of those years?
A. In their place West.
Q. During the last winter of Mr. Kenyon's life did you visit the family there at his residence?
A. I did.
Q. Who was housekeeper and manager of the house?
A. Mrs. Sutton.
251 Q. Were you there frequently?
A. Yes; quite a number of times.
Q. Did you see Mr. Kenyon there?
A. Yes, sir.
Q. Did you ever hear Mr. Sutton, Mrs. Sutton, or Mr. Kenyon—the first two being in the presence of Mr. Kenyon—say anything about this Oconomowoc place that is in dispnte in this suit?
A. Well, I heard it talked over, and saw the plans.
Q. The plans of the house you mean?
A. Yes.
Q. When did you see the plans of the house?
A. Well, not the winter he died; I think it must have been the winter before.
Q. Who was present?
A. Mr. Sutton was drawing the plans that winter.
Q. Did he spend much of his time working on the plans that winter?
A. Well, I saw them a number of times during the winter; I saw him working on the plans.
Q. Did you ever see him with the plans, or see the plans, rather, in Mr. Kenyon's presence?
A. Oh, yes, a number of times.
Q. Did you hear any conversations between those present about them?
A. Yes; a number of times; we talked about the plans, because they had invited me to come out to see them, and wanted me to show them which room I should have. I said I would take a certain room, pointing to one, but Mrs. Sutton said, "No, that is Mr.

A. Friday, I believe.
Q. The day after he was taken sick?
A. Yes.
Q. Who was acting as Mr. Kenyon's nurse?

(Objected to on the ground that the witness should be asked what was done, and that the question calls for a conclusion.)

A. Mrs. Sutton.
Q. What was she doing?
A. You mean when I went there the first time?
Q. Yes.
A. She was sitting by his bed and wetting his lips, I think, with I don't know what.
Q. What was she doing when you went there the second time?
A. I don't remember.
255 Q. What was she doing when you went there every time; was she changing her occupation, or was she engaged with him all time or not?
A. Whenever I went there she was with him part of the time; always.
Q. Were you there the day of his death?
A. I don't think I was.
Q. Mr. Kenyon was not able to converse while you were there during his final sickness?
A. No.
Q. On the evening on which Mr. Kenyon was stricken with his final sickness, and previous to his being stricken, did you see him?
A. You mean the evening at our house?
Q. Yes, the evening that he was taken sick?
A. I saw him there.
Q. Where was he—at your house?
A. Yes.
Q. At what time did he leave your house?
A. As near as I can recollect, I think it was about half-past nine; they never did stay late.
Q. Who left with him?
A. Mrs. Sutton.
Q. Did anybody else leave with them?
A. No.
Q. Mr. Sutton was not there?
A. No.
Q. They dined at your house that evening?
A. They did.
Q. Mr. Kenyon and Mrs. Sutton dined with your family?
A. Well, we did not call it dinner; we called it supper.
Q. Do you know any further facts or circumstances about this case that I have not asked you about?
A. No, I don't think I do.
Q. Do you know anything about Mr. Kenyon's health previous to his final sickness—personally, yourself?
A. No; I used to hear that he was complaining.

Q. Yourself?
A. Yes.
Q. You heard him complain?
A. Yes; just a little, not much; he would say he was not
256 feeling very well; he would be lying down or sitting in a rocking-chair; he used to say it was his headache.

Cross-examination by Mr. ERASTUS F. BROWN:

Q. What was Mr. Kenyon's condition on the evening that he dined at your house?
A. We rather thought he was about as usual.
Q. He ate heartily?
A. I rather think so; I don't know.
Q. There was nothing depressed in his manner?
A. No.
Q. You said you had not had an opportunity of judging of Mr. Kenyon's general health previous to that time, I understood you to say?
A. No.
Q. These conversations to which you have testified as having heard, in reference to the house; are you quite positive in your own mind that all of them were in the presence of Mr. Kenyon and Mrs. Sutton?
A. Well, we had a great many conversations. I suppose we had some when Mr. Kenyon was there and some when he was not there.
Q. These conversations you have testified to—may not some of them, as far as your recollection goes, have been in the absence of Mr. Kenyon?
A. This one in particular, where the rooms were spoken of, I know Mr. Kenyon was there.
Q. At the house?
A. Yes, at the house.
Q. You have stated that Mrs. Sutton nursed Mr. Kenyon at the time he was stricken down, and up to the time of his death—during those four days—how often were you present during that period?
A. I went there on Friday and Saturday. I don't think I was there more than twice. I might have been there three times; I am not sure.
Q. How long did you stay at any one time?
257 A. Well, I think I sat there sometimes for two hours.
Q. Were there any other persons present during the times that you were there besides Mr. and Mrs. Sutton and the doctors?
A. Yes; Mr. Kenyon's sisters were there.
Q. What care and attention did Mr. Kenyon require during the times that you were, as far as your observation went?
A. Well, I think, just wetting the lips; and then, at one time, there was more than that, but I was in the front parlor and they partly closed the doors.
Q. During the period you were there he was in a state of unconscious stupor, was he not?
A. Yes.

Q. Did any one besides Mrs. Sutton sit at the bedside or by the couch of Mr. Kenyon during this period?

A. Yes. I think that I saw Miss Maria Kenyon.

Q. During the whole, or, if not the whole, during what portion of the time that you were there?

A. I don't know; she would go and stay awhile and come away.

Q. So the care that was bestowed upon Mr. Kenyon at that time by those present, not including the doctors, was not entirely confined to Mrs. Sutton, but was shared in by others who were present there; is not that the fact?

A. Well, I think that Mrs. Sutton did the greater part of it.

By Mr. WESTOVER:

Q. You did not hear Mrs. Sutton drive any of Mr. Kenyon's relatives away from him?

(Objected to.)

A. I think Mrs. Sutton was very glad to have them.

It is admitted that the sisters of Mr. Kenyon, who were
258 within access of his bed during his last sickness, came there and extended to him such sympathy and sisterly attention as kind sisters should do to a brother whom they loved.

(By consent, the signature of the witness is waived.)

ADELIA M. VALENTINE, being duly sworn and examined on behalf of the complainant, testifies as follows:

Direct examination by Mr. WESTOVER:

Q. Where do you reside?

A. 53 East 123d street.

Q. With the family of Dr. Hills?

A. Yes.

Q. How long have you resided in Dr. Hills' family?

A. I resided there before I was married and then again for the last eight years.

Q. You are in some way connected with Dr. Hills' family, are you not?

A. I am Mrs. Hills' niece.

Q. Do you know Mr. and Mrs. Sutton?

A. Yes.

Q. Long?

A. I have always known Mr. Sutton.

Q. Have you known Mr. Sutton many years?

A. A great many years; I don't remember how many.

Q. Did you know Mr. Kenyon in his lifetime?

A. Yes.

Q. How long had you known him?

[A.] I don't remember; a great many years.

Q. Did you ever visit or board with Mrs. Sutton at Oconomowoc, Wisconsin?

A. I boarded there in 1878, for the summer.

Q. Who was with you?
A. My aunt, Mrs. Hills.
Q. Any one else?
A. Boarding there at the time?
Q. Yes.
A. Miss Miller and Miss Millie White.
Q. They were there at the time?
A. Yes.
Q. Was Mr. Kenyon there any of the time that you were there?
A. He was there at that time.
259 Q. Did Mr. Kenyon have any attacks of indisposi[tion] at any time while you were there that summer?
A. He was sick once while I was there, I believe, and he was not feeling well most of the time.
Q. What was the sickness of which he complained when he was most sick?
A. His head.
Q. How sick was he then; that is, what apparent effect did it have upon him?
A. I don't remember; I don't remember whether he was confined to his room or not.
Q. Do you know whether he was confined to the house or not?
A. Yes, I think he was.
Q. You say he was not feeling well most of the time; of what did he complain the other times?
A. His head.
Q. I am not speaking of other times different from this time when he was particularly sick, but what did he ordinarily complain of?
A. It was his head that mostly troubled him.
Q. Did he require or receive any attentions or nursing during any of those indispositions, that you know of?
A. Mrs. Sutton always attended to him.

(Answer objected to by defendants' counsel as not responsive.)

Q. At that time?
A. Yes.
Q. Who did attend to him?
A. Mrs. Sutton gave him what attention he required.
Q. Do you know where Mr. and Mrs. Sutton and Mr. Kenyon resided in the winter of 1881–'82, being the winter of Mr. Kenyon's death?
A. Yes; they resided in 124th street, in this city.
Q. Where were they, if you know, in the summer previous to that?
A. In Oconomowoc.
Q. And where were they the winter previous to that—the winter of 1880–'81?
A. In 124th street.
Q. Do you know how many winters they resided there?
A. I think three.
260 Q. The three last winters of Mr. Kenyon's life?

A. Yes.
Q. Do you recollect the circumstance of their going West in the spring of 1881?
A. Was that the last spring?
Q. Yes.
A. Mr. Sutton went first, and Mrs. Sutton and Mr. Kenyon went afterwards; I mean the last time they went West.
Q. Do you recollect whether or not Mr. and Mrs. Sutton and Mr. Kenyon came to New York together in the fall, before they went to reside, or just before they went to reside, at 124th street in this city?
A. I do not remember.
Q. Did you ever visit them at 124th street?
A. I did.
Q. How near them did you reside?
A. On the next block.
Q. How often did you visit them?
A. Quite frequently; I don't remember how often.
Q. During each winter that they resided there?
A. Yes.
Q. State if you observed what was Mr. Kenyon's condition at the times you made those various visits to the house.

(Objected to on the ground that the witness is not an expert and it calls for expert testimony.)

Q. Well, what was he doing at any of these various visits that you made to him?
A. Walking around, sitting down, or reading.
Q. Was he well always.

(Objected to.)

A. He didn't seem well.
Q. How did he seem?
A. He seemed to me like a sick man.
261 Q. Did he complain or not?
A. He complained a gread deal.
Q. What did he complain of?
A. Of his head more than anything else.
Q. What position, if any, would he take to relieve his pain, or what measures would he take, if he took any?
A. I don't recollect.
Q. Do you know whether anybody nursed him during those attacks of headache or during those attacks of indisposition that you saw?
A. I do not know.
Q. You never had any conversation with Mr. Kenyon at all about the Oconomowoc place?
A. No; I never did.
Q. Where were you when Mr. Kenyon died?
A. On Long Island.

Cross-examination by Mr. ERASTUS F. BROWN:

Q. During what year were you at Oconomowoc?
A. In 1878.
Q. And the length of time?
A. About two months.
Q. Of course you resided at that time with Mr. and Mrs. Sutton?
A. We were boarding with Mrs. Sutton.
Q. And Mr. Kenyon was there?
A. Yes.
Q. Please state generally the character of the entertainments during that period— outdoor sports or indoor amusements?
A. Well, outdoors we were on the lake or walking in the village.
Q. You would go, of course, not alone, but in company?
A. Yes.
Q. Who would accompany you on these expeditions, referring, of course, to the members of the family who were living or residing there at the time?
A. We would generally all go.
Q. Mr. Kenyon accompanied the company?
262 A. Sometimes, not always; he was not always well enough to accompany us.
Q. Do you call to mind any particular period there when he was unable to accompany the party?
A. I don't remember any dates, but I know there were times when he could not accompany us because he was not well enough.
Q. But he did frequently?
A. He accompanied us sometimes.
Q. And in the house, as far as the entertainments went, did he take part in those entertainments?
A. Sometimes. The entertainments at the house were very quiet; it was very quiet at the house.
Q. How long did the headaches which Mr. Kenyon had while you were there continue, as a general thing?
A. I don't remember.
Q. Do you remember of Mr. Kenyon ever being unable to come to table and to partake of viands during that period?
A. I don't remember.
Q. You cannot say whether the headaches to which you have referred ever kept him away from the table?
A. I don't remember.

(By consent the signature of the witness is waived.)

Further hearing adjourned to May 31, 1883, at ten o'clock a. m.

NEW YORK, *May* 31, 1883.

Hearing resumed.

Present: Counsel as before, and Mr. E. F. Brown, one of the defendants, in person.

JULIA L. WHITE, being duly sworn and examined on behalf of the complainant, testifies as follows:

263 Direct examination by Mr. WESTOVER:

Q. Where do you reside?
A. At 83 Woodhull st., Brooklyn.
Q. How long have you resided there?
A. 27 years.
Q. What relation are you to Mrs. Sutton, the complainant in this case?
A. A sister.
Q. Did you know Mr. Kenyon in his lifetime?
A. Yes.
Q. For how long were you acquainted with Mr. Kenyon?
A. Always.
Q. You mean since your recollection?
A. Yes.
Q. You are now the wife of Mr. William E. White, of Brooklyn, who is in business in this city?
A. Yes.
Q. Were you ever at Oconomowoc, Wisconsin?
A. Many times.
Q. Do you recollect the circumstance of Mr. and Mrs. Sutton and Mr. Kenyon being at Oconomowoc, Wisconsin?
A. I was at Mrs. Sutton's house I stayed.
Q. Do you recollect about how long ago Mrs. Sutton commenced residing in Oconomowoc, Wisconsin?
A. Well, she was there some time before she kept house; do you mean when she commenced housekeeping?
Q. Tell just how it did happen—what the course was when she first went there, as far as you konow—whether she kept house there or boarded. Tell the circumstances as they were.
A. I think she must have gone there in 1871 or 1872—she and her husband and Mr. Kenyon.
Q. How long did she continue at Oconomowoc, do you know?
A. She is there still.
Q. That is her residence yet?
A. Yes.

264 Q. Do you recollect how often, within your knowledge, Mr. Kenyon has been to Oconomowoc, or about how much he has been there during that time?
A. Why, most of the time.
Q. When did you first go to Oconomowoc yourself?
A. First in my life?
Q. Yes.
A. In 1867.
Q. Was that previous to the residence of Mrs. Sutton and Mr. Kenyon in Oconomowoc?
A. Yes.
Q. When did you next go?
A. In 1875.
Q. Where did you go when you went there in 1875?
A. To Mrs. Sutton's.

Q. Was she then housekeeping?
A. She was.
Q. Where?
A. In a cottage on Main street.
Q. What other years have you been there, since 1875, to the best of your recollection?
A. I think I have been there part of every year up to 1879.
Q. Including the year 1879?
A. Yes; I was there that summer.
Q. In what seasons of the different years did you go there?
A. Sometimes we went in June, always by the first of July, and then returned in the fall—different times in the fall.
Q. Where did you make your home in Oconomowoc while you were there during those several years?
A. At Mrs. Sutton's.
Q. Did you meet Mr. Kenyon there?
A. Always.
Q. That house in which Mrs. Sutton resided, you say, was a small house on Main street?
A. Yes.
Q. Was it near Dr. Miller's house?
A. Opposite.
Q. On the opposite side of the street?
A. Yes.
Q. What lake did that house, or the yard in which that house was situated, border upon?
A. La Belle.
Q. What was the condition of Mr. Kenyon's health, as you observed, during those several years that you met him at Oconomowoc?

265 (Objected to, as the witness should rather state what she saw and heard than to give the conclusion of her observation.)

A. He was always complaining.
Q. How was he complaining—of what?
A. Of a great deal of pain in his head.
Q. Was that much of the time that he was complaining?
A. Three-quarters, I should think.
Q. How severe have you known these attacks of indisposition to be?
A. Sometimes so that he would go to bed with it, and other times so that he sat in a sort of invalids' chair with his head bound up.
Q. What was generally done for him during those severe attacks?
A. He had compresses put upon his head.
Q. Who attended to him, if anybody, while he was suffering at those times?
A. Mrs. Sutton.
Q. What did she do?
A. Whatever was to be done—whatever could be done.

Q. Did Mrs. Sutton have any further personal care of him during those particular attacks that you noticed while you were there?
A. She always took care of him.
Q. What did she do, and how?
A. Wherever he went she went.
Q. Did he at that time require much care?
A. Why he was very subject to those bad attacks in the head?
Q. Was he always asking for care during those attacks?
A. Yes; when they were coming on whatever he wanted to have put on his head he always wanted it.
Q. To whom did he apply?
A. To Mrs. Sutton.
Q. Did he call upon anybody else for nursing and assistance that you know of, except Mrs. Sutton?
A. No.
Q. If I understand you, you were there in 1875, 1876, 1877, 1878, and 1879?
A. Yes.
Q. Have you been there since 1879?
A. No.
266 Q. Do you know the place in Oconomowoc sometimes called the Breck place—the place in dispute in this suit?
A. I do.
Q. When did you see that place?
A. I went with Mr. Kenyon to see it in 1879.
Q. Did you go to see any other place with Mr. Kenyon?
A. Yes; I went to see a place called the Starkweather place.
Q. Was anything said by Mr. Kenyon as to why you then went to look at these places?
A. Yes.
Q. What was it.
A. He told me he was going to buy one of them for Mrs. Sutton, and he took me with Mrs. Sutton to see which she preferred.
Q. Three of you went together?
A. Yes.
Q. Was there any more of the party?
A. My little child.
Q. Your daughter?
A. Yes.
Q. How old is she now?
A. Thirteen.
Q. Did you ride or walk?
A. Rode.
Q. In a carriage?
A. Yes.
Q. Did you look over those places?
A. We did.
Q. Was any preference expressed then by Mrs. Sutton, or don't you recollect?
A. Yes; she preferred the Breck place; we all did.
Q. Did he ask your opinions, all of you, as to your preferences?

A. Yes.
Q. Where is the Breck place situated?
A. It is on La Belle Lake.
Q. On the borders of this same lake on which this little cottage is in which Mrs. Sutton then lived?
A. Yes.
Q. How far from that cottage, probably, in a direct line across the water?
A. Not so very far.
Q. Less than half a mile?
A. I don't know. I have rowed there from one place to another.
267 Q. You have rowed a boat there?
A. Yes.
Q. What did Mr. Kenyon busy himself about during those summers that you were there?
A. He didn't do anything.
Q. Did he go out any?
A. He did if the rest of us did.
Q. Was he at all times able to go out when the rest of the family went out?
A. No.
Q. Where did he often stay while you went out upon the lake—the rest of you—while he was indisposed?
A. Either in bed or in his invalid chair.
Q. Was there a veranda to that house?
A. Yes.
Q. How about that?
A. He would sit out there sometimes, but when his head was pretty bad he didn't like the light.
Q. Do you remember the first winter that Mr. Kenyon and Mrs. Sutton and Mr. Sutton resided here together in New York?
A. Yes.
Q. What winter was that?
A. The winter of 1879–80.
Q. The winter after your last visit at Oconomowoc?
A. Yes.
Q. Do you remember when they came from the West here that fall, the fall of 1879?
A. About Thansgiving, I should think.
Q. Did they come together?
A. They did.
Q. Where did they go when they arrived?
A. Mr. Kenyon went to his relatives in Harlem, I think, and Mr. and Mrs. Sutton came to my house.
Q. How long did they continue in your house?
A. Until January.
Q. Then, what did they do?
A. They went to keep kouse for Mr. Kenyon at Harlem.
Q. On what street?
A. On 124th street.

Q. And how long did they remain in that house then?
A. They went back late in the spring.
268 Q. Back where?
A. To Oconomowoc.
Q. Then how long did they remain in Oconomowoc before returning to this city again?
A. I think they came the next November.
Q. Then where did they go after they came here?
A. Directly to that house on 124th street.
Q. That was in November, 1880?
A. Yes.
Q. Did they keep house there then?
A. A. Yes.
Q. How long did they remain there that winter, housekeeping?
A. Until the spring.
Q. Until the spring of 1881?
A. Yes.
Q. Then where did they go?
A. Back to Oconomowoc.
Q. All together?
A. I think Mr. Sutton went first, and Mrs. Sutton waited and took Mr. Kenyon.
Q. That was the spring of 1881; when next did they come here to New York?
A. They came back next fall.
Q. Then they returned to New York?
A. Yes.
Q. That was the fall of 1881?
A. Yes.
Q. All came together?
A. Yes.
Q. Where did they then go?
A. To the house in 124th street.
Q. And they there resided together?
A. Yes.
Q. How long?
A. Until Mr. Kenyon's death, in January, I think.
Q. What did Mr. and Mrs. Sutton do after Mr. Kenyon's death? I mean where did they stay?
A. They stayed in the house for a time. Then Mr. Sutton went to Oconomowoc, and Mrs. Sutton came and visited me.
Q. Then where did she go?
A. Then she went back to Oconomowoc.
Q. And they have not been here since that you know of?
A. No.
269 Q. Do you recollect how long Mr. and Mrs. Sutton remained in the house at 124th street after Mr. Kenyon's death?
A. I know they were out of it in March.
Q. You do not know exactly when they left?
A. No.
Q. Where did you say that Mr. Kenyon was in the fall of 1879,

just after they all came from the West, in the interim, while they were in New York, previous to commencing the housekeeping on 124th street?

A. He was with his sisters.

Q. Did you see him during that term?

A. Oh, yes.

Q. Where did you see him?

A. At my house.

Q. Was he there at your house often during that term while Mr. and Mrs. Sutton were there?

A. Sometimes twice or three times a week.

Q. During the winters in which Mr. Kenyon and Mrs. Sutton and Mr. Sutton resided here, as you have testified, at 124th street, were you a visitor at their house?

A. Yes.

Q. How frequently did you visit their house?

A. Every week.

Q. Did you meet Mr. Kenyon there frequently?

A. Always.

Q. What did you observe, if anything, as to Mr. Kenyon's condition, by his own complaints or otherwise, during your visits at that house in those winters?

A. Well, I thought he was pretty feeble, had a great deal of trouble with his head.

Q. Did he so complain?

A. Yes.

Q. Did he complain of the recurrence of those attacks of headache of which you have testified?

A. Yes.

Q. Did any other person than Mr. Kenyon and Mr. and Mrs. Sutton reside in that house during those winters?

A. They had a servant.

Q. The family consisted, then, of those three.

A. Yes.

270 Q. Did they occupy the entire house?

A. Yes.

Q. Was there any other person with them except a servant?

A. No.

Q. Were you at that house during Mr. Kenyon's last sickness?

A. Yes.

yon?

A. Yes.

Q. Who was?

A. Mrs. Sutton.

Q. Did you meet any physician there?

A. Yes.

Q. Whom?

A. Dr. Hills.

Q. Did you hear him give instructions concerning Mr. Kenyon to any one?

A. To Mrs. Sutton.

Q. Was Mrs. Sutton there on the last day you were there—the day of Mr. Kenyon's death?

A. Yes.

Q. How long previous to his death were you there?

A. I think I left there between eleven and twelve, and he died somewhere about one.

Q. When you left there he was very low, was he not?

A. Yes.

Q. Was Mr. Kenyon conscious during any of your visits; I mean after he was struck with his final sickness?

A. No.

Q. Who attended to the wants of Mr. Kenyon during the times previous to his final sickness when you had been there and he was indisposed?

A. Mrs. Sutton.

271 Q. At any time during your visits there to the house in 124th street was the subject of any place in Oconomowoc resumed?

A. Yes.

Q. Did you see anything there?

A. I saw the plans of the new house.

Q. On what place was that new house to be built, as they said?

A. On the Breck place.

Q. Who showed you the plans?

A. Mr. Kenyon and Mr. and Mr. Sutton—all together.

Q. Did you see those plans at any other place than at the house?

A. At my own house.

Q. In Brooklyn?

A. In Brooklyn?

Q. When was that—the same winter?

A. The same winter.

Q. What winter was that?

A. That must have been the winter of 1880–'81, I guess.

Q. That was the winter before that in which he died?

A. Yes, sir.

Q. You saw the plans that winter at your house in Brooklyn?

A. Yes.

Q. Who took them there—do you know?

A. Mr. Kenyon.

Q. Who was with him?

A. Mr. and Mrs. Sutton.

Q. Why were they taken to Brooklyn—do you know?

A. To show them to us.

Q. Were they shown to you?

A. They were.

Q. To whom?

A. To myself.

Q. What was said about them?

(Objected to, unless it be confined to what Mr. Kenyon said, or what was said by others when he was present.)

Q. What was said about them when they were all together at your house—well, I will not confine you to that, as you have testified to looking over the plans two different times. You may state at either of those interviews what was said by Mr. Kenyon,
272 or by any one present, when all were present, about the plans?

A. Mr. Kenyon asked me if I could suggest anything that I thought would please Mrs. Sutton, as he wanted it exactly as she wished it, as it was for her.

Q. Did they or he then state where the house was to be or was being built?

A. Yes.

Q. Did you understand from their conversation that the house was yet unfinished or was not yet constructed?

A. I understood at first that it was not, but afterwards it was partly finished.

Q. At another interview?

A. Yes.

Q. Was there anything about the use the house was to be put to?

A. It was to be their home.

Q. Were there any indications in the plans of the parts that were to be occupied by any particular person in the house?

A. Only by Mr. and Mrs. Sutton and Mr. Kenyon.

Q. Were the rooms that they were to occupy in any way related?

A. They were connected.

Q. What was said about those rooms when they were all present, if anything, about their being connected, and were any reasons given?

A. Why, Mr. Kenyon always wished his room to connect with Mr. and Mrs. Sutton's on account of his being taken sick in the night.

Q. Was any other person present besides the family, as you have described—either family—and yourself when the plans were talked about, if you recollect?

A. I don't think so.

Q. Was there anything said as to whose the place was or was to be?

(Objected to by Mr. Brown.)

A. Yes.

Q. What was said in that respect?

A. Why he said it was to be Mrs. Sutton's.

273 Q. Was anything further said about that, if you recollect?

A. Yes,

Q. What was said about it?

A. Mr. Kenyon said he wanted to give it to her, for she had taken care of him, and was to continue to take care of him as long as he lived—had promised to.

Q. Did he say anything about any promise on his own part?

(Objected to.)

A. That he had promised to give it to Mrs. Sutton.

Q. State if he said anything about having made a promise, and what it was?

(Objected to.)

A. He said he had promised to give it to Mrs. Sutton.

Q. Did he state that in connection with having stated what Mrs. Sutton had promised?

(Objected to.)

A. It was at the same time.

Q. Was that conversation which you have in mind now held at 124th street or at your home?

A. At both places.

Q. The substance of it was repeated?

A. Yes.

Q. Then the reason that he gave at 124th street for having promised this place to Mrs. Sutton—he gave the same reason at your house, or did he?

(Objected to.)

A. Yes.

Q. You stated about having had some conversation with him in which you were informed by Mr. Kenyon, or by the others of the family of Mr. Kenyon's presence, subsequently, when you were informed that the house had been partially built. Do you recollect anything further about that?

A. I don't understand what you mean.

274 Q. I understood you awhile ago to say that they subsequently told you that the house had been commenced?

A. Yes.

Q. And partly built?

A. Yes.

Q. When was that; do you recollect?

A. That was the winter that Mr. Kenyon died.

Q. Then you did have some conversation that winter with him?

A. Yes.

Q. What do you recollect that they told you about it—about its being partly built—anything more?

A. That they were very anxious to get it finished.

Q. Did they say anything about when they hoped to have it done, or about anything of that kind?

A. The following summer.

Q. That they expected to have it finished then?

A. Yes.

Q. And before that summer he died?

A. Yes.

Cross-examination by Mr. ERASTUS F. BROWN:

Q. You reside in Brooklyn?

A. Yes.

Q. Your are the sister-in-law of Mr. Westover, now present, who appears as representing the complainant in this matter?

A. Yes.

Q. Mr. Westover resides at Chicago?,

A. Yes.

Q. Do you know the fact that Mr. Westover, now present, has been examined as a witness in this case on behalf of the complainant?

A. Yes.

Q. Has Mr. Westover been temporarily residing with yourself during the last few days?

A. He has.

Q. Have you been in consultation together during this period, previous to this date, in regard to these matters?

A. Yes.

Q. Has he spoken to you during the period referred to in reference to the importance of establishing certain facts in this case?

275 A. No; he told me to tell what I knew, only not to be too long.

Q. But, in saying that he told you to say what you knew, you do not intend to limit your conversations to that brief communication?

A. Do you mean what he said to me?

Q. You have conversed together freely during the period just referred to, with regard to this suit and the matters in controversy, and the facts necessary to be proven here?

A. Do you mean that he conversed with me upon what I knew?

(Question repeated.)

A. Well, I don't know as I did.

Q. You have conversed with him freely, have you not, with regard to the matters connected with this suit, during the period referred to?

A. Well, I commenced to tell him what I knew, and he told me not to be too long telling it. Is that what you mean?

Q. Do I understand that that was the extent?

A. Yes.

Q. How long has he been temporarily residing at your house now since he came on from Chicago here—three or four days?

A. Yes; but then he has only slept there; he has not been there during the day or evening, not until late.

Q. And do I understand that all the conversation that you have had with Mr. Westover during the periods in which he has been at your house since he arrived here from Chicago was a statement from him that he wanted you to state what you knew, but to be brief in stating it?

A. That is about the whole of it.

Q. When was that said, when he first arrived?

A. No.

Q. How long after?

A. Well, in a day or two.

276 Q. Then, was nothing said at all between you and him in reference to this suit from the time he arrived until that period?

A. No.

Q. And nothing was said to you in regard to this suit from the time he made that statement to the present time?

A. Not until we were coming here this morning together.

Q. Then, as far as matters connected with the suit are concerned, your mouths have been sealed, except as to this statement which you now allege you made alone?

(Objected to, because it assumes a statement not based on any testimony.)

A. Do you mean as regards my testimony?

Q. Confining yourself, of course, to matters connected with this suit, what, generally, did Mr. Westover and yourself speak in reference to?

A. We discussed Dr. Freeman's testimony about different headaches and apoplexy.

Q. And what else?

A. I don't know as anything else.

Q. And this conversation as to Dr. Freeman's testimony took place after the meeting here the day before yesterday?

A. Yes.

Q. At the same time that you spoke of Dr. Freeman's testimony, did you not speak of the testimony of the other witnesses who were here and were then examined?

A. No.

Q. Will you please state when you first went to Oconomowoc?

A. In 1867.

Q. That was previous to the time that Mr. Kenyon was there?

A. Yes.

Q. And were you there in 1868?

A. No.

Q. In 1869?

A. No.

Q. In 1870?

A. No.

Q. In 1871?

A. No.

Q. In 1872?

A. No.

277 Q. In 1873?

A. No.

Q. In 1874?

A. No.

Q. In 1875?

A. Yes.

Q. Then with the exception of that time that you were there in 1867, the period that you were there in 1875 was the earliest period?

A. Yes.

Q. Where did Mr. and Mrs. Sutton reside at that time—in 1875?
A. In a cottage on Main street, in Oconomowoc.
Q. Was Mr. Kenyon there also?
A. Yes.
Q. What time of the year, if you please, did you go to Oconomowoc?
A. Either the last part of June or the first part of July; the last of June, I think.
Q. How long did you remain there at that time?
A. Until the fall.
Q. Until what month, as far as you can recollect?
A. September or October?
Q. You resided with Mr. and Mrs. Sutton there?
A. Yes.
Q. Please state generally how Mr. Kenyon was occupied, if at all, during that summer and fall, up to the time you left?
A. He didn't do anything; is that what you mean? He would go out on the lake for a little boating, or out for a little ride; do you mean that? If you mean employment, he had none.
Q. Was he in such a feeble condition of health, then, apparently, that he was not able to attend to anything, or was it because not being called upon so to do he was apparently disinclined?
A. I don't think he could have attended to anything—I am sure he could not.
Q. You say he could not have attended to anything at that time?
A. Yes; I don't think he could.
Q. He was then in such a feeble condition of health?
A. Well, he was complaining most of the time of feeling bad.
278 Q. But you have known persons who complained being able to attend to business?
A. Yes.
Q. Then do I understand you to say that Mr. Kenyon was in such a feeble condition that he was not able at that time to attend to anything, and therefore refrained from so doing?
A. Maybe if he was positively obliged to he could have got around to do it.
Q. Got around by dragging, do you mean?
A. Yes; he got around by dragging most of the time.
Q. Did he ever drag himself around on the lake alone?
A. No; he was never on the lake alone.
Q. Did he ever drag himself around in a carriage?
A. No; he had assistance always.
Q. You say he did not drag himself to the carriage, but was assisted?
A. Yes.
Q. Now, what was his condition of health at the time he was assisted into the carriage?
A. He was feeble.
Q. And he needed to be helped in; is that so?
A. Well, they helped him in.

Q. Did he appear to need it?
A. He did not object to it.
Q. How did they help him in?
A. They took him by the arm and helped him in, the same as they would a lady.
Q. The same as they did yourself?
A. Yes.
Q. Was that, as [it] appeared to you, for the purpose of being gracious or for the purpose of rendering him actual assistance which he needed?
A. Well, I thought he was an invalid, and that he required it.
Q. Did you ever know him to ride alone?
A. Never.
Q. Did you ever know him to walk out alone?
A. Yes.

279 Q. You have stated that he was assisted to the carriage, and that he never went out alone, and appeared to be an invalid. Please state to what extent he appeared to be an invalid while he was walking around as you say, alone?
A. Well, he always walked with a pretty heavy cane.
Q. How heavy a cane?
A. I don't know; the one he had at Oconomowoc was pretty thick.
Q. Did he seem to use it on account of his feebleness?
A. He never went without it.
Q. Was he not frequently on the streets of Oconomowoc alone?
A. Not while I was there.
Q. Do you know any reason why he was not?
A. We all thought he would have another one of those bad attacks.
Q. Were those attacks previous to 1875?
A. Why, he would have those sudden spells—I don't know whether it was vertigo or not—but so that he would become [so] dizzy that he could not stand up—before he had what they call the apopletic attack.
Q. I am confining myself at this time to this summer and fall of 1875; was he, during that period, so — that it was thought by those of the household not safe for him to go out on the streets alone?
A. I don't know.
Q. By yourself?
A. He never, or very rarely, went out alone.
Q. Do you call to mind any special occasion when he went out alone?
A. Only his returning from New York.
Q. I am referring now to that time when you were there?
A. At that particular time I do not know of his going out alone.
Q. Then, do I understand you to say that his going out alone was so extremely seldom that it has not impressed itself upon your mind?
A. Yes.

280 Q. Did you see Mr. Kenyon any part of the year 1876—not at Oconomowoc, but at New York city?

A. I did.

Q. State, if you please, when you were next at Oconomowoc.

A. After 1875?

Q. Yes.

A. The summer of 1876.

Q. What time of the year did you arrive at Oconomowoc at that time?

A. Either the last of June or the first part of July.

Q. How long did you remain there that year?

A. Until the last of September or October, I can't say which.

Q. And the next occasion, please?

A. 1877; the same.

Q. From what period?

A. From the last part of June or first part of July; I can't recollect which, exactly.

Q. Until the fall?

A. Yes.

Q. Down to October or later?

A. Sometimes until October; sometimes we came back in September, and once, I believe, in August.

Q. You don't remember as to this last occasion, whether it was August, September, or October that you left; am I correct?

A. I know when I left in August; it was in 1879. In 1877 we remained until September or October.

Q. And the next time, if you please?

A. That would be 1878—about the same.

Q. What time did you go—in June about?

A. Yes.

Q. And remained down to September or October?

A. I don't think October; I think we came back earlier—in September.

Q. Is there nothing by which you are enabled to state with more definiteness in reference to the time you returned?

A. No.

Q. And the next year?

A. I came back in August.

281 Q. What time did you arrive there the next year?

A. In June or July, about the same time.

Q. And what year was that?

A. That was 1879.

Q. Is that the last year that you were there?

A. Yes.

Q. Please state the period you spent there in 1875, commencing and ending.

A. I went there in June or July, but Mr. Kenyon din'nt come, I think, until about the 1st of August or so.

Q. And what time did you leave that year?

A. In the fall, September or October; either the last of September or first of October.

Q. Now, please state whether this condition of health on the part of Mr. Kenyon continued during these various subsequent periods which you have testified to as having been at Oconomowoc at the house of Mr. and Mrs. Sutton.

A. He had headache most of the time.

Question repeated.

A. It continued all the time.

Q. Please state, if you are able, whether it increased or diminished.

A. Some days it was very bad.

Q. I am not now talking in regard to days, but in regard to the various periods, whether this state of health increased or diminished.

A. I think in 1879 he had them oftener than before.

Q. How was it at the next earlier period?

A. In 1878; I guess about the same. In 1878 and 1879 he seemed to be worse.

Q. And previous to 1878 how did it compare then with his condition of health in 1875?

A. About the same.

Q. Do I understand you correctly as having said that this condition of health which you observed in 1875 continued down to about the year 1878 and 1879, when his condition of health was worse?

A. Yes; he was weaker.

282 Q. Please state during what periods you saw Mr. Kenyon in New York subsequent to the year 1874 if at all?

A. I can't do it.

Q. Did you see him in 1875 in New York?

A. Yes; in Brooklyn at my house.

Q. During what period of the year?

A. In June.

Q. Just previous to your leaving?.

A. Yes; either in June or July; I am not sure which.

Q. Then after having seen him you went to Oconomowoc?

A. Yes.

Q. And he subsequently went to Oconomowoc?

A. Yes.

Q. Where did you see him during that time?

A. Here, do you mean?

Q. Yes; I mean in that year.

A. At my own house.

Q. Did you see him often during that year, previous to going to Oconomowoc, in 1875?

A. That summer I presume I saw him three or four times.

Q. You saw him at your house?

A. Yes.

Q. In 1876 did you see him in New York?

A. Yes.

Q. Where did you see him at that time?

A. At my house.

Q. Was he frequently at your house?

A. I guess every week when he was in New York.

Q. Do you know where he resided while he was in New York during the years 1875 and 1876?

A. With his sister.

Q. Did you see him in 1877 in New York at all?

A. Yes.

Q. During what period of the year?

A. I think in the summer, and I think about the holidays too; about Christmas time.

283 Q. Do you know where he resided at that period while he was in New York?

A. At his sister's house, I suppose; I don't know.

Q. You have reason to believe so?

A. Yes; as far as my knowledge goes he did.

Q. During the year 1878 did you see hin?

A. I saw him at Oconomowoc.

Q. I am not referring to Oconomowoc now; did you see him in New York or Brooklyn in that year?

A. I think not.

Q. He did not call at your house during that year?

A. I have no recollection of it.

Q. You were at Oconomowoc in 1878?

A. Yes.

Q. You arrived at what time, would you say, that year?

A. Early in the summer; June or July, I don't know which.

Q. Do you know at what time Mr. Kenyon arrived there that year?

A. He was there, and he was there while I was there.

Q. Do you know at what time he left New York for Oconomowoc that year, or about what time?

A. No; I don't think he was in New York.

Q. You think then that he spent that winter in Oconomowoc?

A. I don't know; he did that summer; about the winter I don't remember.

Q. Are you certain that you did nor see him in New York that year—1878—how do you account for it?

A. In the summer of 1878?

Q. No.

A. In the winter of 1878?

Q. The time that he was in New York, if he was?

A. I don't remember seeing him in New York that winter or summer.

Q. Did you see him in 1879, during the time he was in New York?

A. He was not here.

Q. Not in 1879?

A. He didn't come to see me if he was.

284 Q. In 1880?

A. I saw him.

Q. In New York?

A. Yes.

Q. Then, there were two years, as far as your present recollection goes, when he didn't call to see you—1878 and 1879?

A. Yes; he may have been, about the holidays of 1878, but I don't remember. If he was in New York he was there.

Q. You were on intimate terms with Mr. Kenyon during the time that he was in the city of New York at the times you refer to as having seen him from time to time—your family and yourself were intimate with him?

A. Yes.

Q. Did Mr. Kenyon—referring, of course, to your observation and what you saw—enjoy better health in Oconomowoc than he did in New York, or better in New York than in Oconomowoc?

A. I didn't see him enough in New York to know.

Q. You have heard Mr. Kenyon say, have you, that Oconomowoc agreed with him?

A. Yes.

Q. And that he felt better there than when in New York?

A. Yes.

Q. Please state when this conversation took place to which you have testified on your direct examination in reference to the place called the "Breck" place and the "Starkweather" place.

A. Do you mean when he took me to ride to those places?

Q. Yes?

A. In August of 1879.

Q. During the few days last past, while Mr. Westover has been here residing temporarily with you, did you speak to him of these conversations?

A. I don't think so.

Q. You have stated that you "don't think so;" is there any uncertainty in your mind as to that fact, or are you in doubt?

A. I don't think I did.

285 Q. Did you state to Mr. Westover anything in relation to these various conversations that you had, previous to being examined here to-day?

A. I might have; something. I don't know.

Q. As you say you "might have; something;" I wish you would endeavor to refresh your recollection and state.

A. We discussed headaches; I know that.

Q. Did you discuss headaches as a theoretical question, or in connection with Mr. Kenyon's headaches?

A I suppose it was Mr. Kenyon's headaches more particularly.

Q. When you conversed with him in regard to Mr. Kenyon's headaches, you conversed with him in regard to the headaches which he had in Oconomowoc?

A. No particular one.

Q. But generally?

A. Yes; it was with regard to headaches that produce apoplexy—headaches followed by apoplexy.

Q. Please state, if you will (not inquiring as to matters foreign to this controversy), the purport of those conversations with regard to headache between yourself and Mr. Westover during the time he has been here in New York.

A. Why, I wondered how many of the people that had headaches

would have apoplexy, or whether they were the same kind. Is that what you mean?

Q. I want the conversation.

A. Well, that is about it.

Q. How long did that conversation last?

A. Oh, not very long; I have not seen very much of Mr. Westover.

Q. At the time at which this conversation took place, to which you have testified, in reference to the "Breck" and "Starkweather" places, please state from what point you started.

A. From the house in Oconomowoc.

Q. What time of the day?

A. After dinner.

286 Q. Was this the first conversation you had had?

A. Oh, no.

Q. Did I not understand you to say, on your direct examination, referring to the conversation, that this was the first conversation that you had had with Mr. Kenyon and others present with regard to this "Breck" place?

A. Oh, I thought you meant as regards any place.

Q. I mean as regards the "Breck" place.

A. As regards the "Breck" place, yes.

Q. What is the distance between the place where Mrs. Sutton resided and the "Breck" place?

A. Not very far.

Q. Did you walk?

A. No; rode.

Q. How long were you occupied going from one place to another?

A. I don't recollect.

Q. Fifteen minutes, or how long?

A. I could not say, because we went to other places.

Q. Did you go there directly?

A. No; we stopped at other places.

Q. Where did this conversation which you have detailed in regard to those places take place?

A. In Oconomowoc.

Q. I understand that, but please state where there.

A. In Mrs. Sutton's house.

Q. At what time of day?

A. Let me understand; do you mean when Mr. Kenyon spoke to me about his buying one of those two places?

Q. Yes.

A. Oh, it was many days; several days, and all kinds of days.

Q. How many days, first, previous to the time that you went there?

A. I could not say.

Q. You cannot say whether it was three days, or a week, or two weeks, or three weeks?

287 A. I don't think it was three weeks; it might have been a week or ten days.

Q. Did Mr. Kenyon at that time say that he had been endeavoring to obtain the Breck place for some time, but now, as he had an opportunity of obtaining it at a fair price, he had determined to purchase it?

A. He didn't say so to me; no, sir.

Q. Or any words of that purport?

A. No, sir; not to me.

Q. This was in the year 1879?

A. 1879.

Q. Please state what time of year.

A. I think it was in August.

Q. Did I understand you to say that on this ride from Mrs. Sutton's residence to these places this conversation took place to which you have testified?

A. It did; both at the house and on the ride, too, it was the subject of conversation.

Q. Did he ask your opinion as to which was the preferable place?

A. He asked me which I thought was the prettiest.

Q. To which place did you first go?

A. The Starkweather.

Q. Then you went to the Breck place?

A. Yes.

Q. And then he asked which place was the prettiest?

A. Yes, which I thought was the prettiest.

Q. Did he ask you which place you would prefer as a residence?

A. I don't know as he did.

Q. Please state again the conversation which you have already detailed on your direct examination in regard to this matter—how it began, what was said, and how it concluded.

A. I don't remember how it began; he said he would like to take me to see the two places; that he was going to buy one for Mrs. Sutton. Is that what you mean? There was so much con-
288 versation before that I don't understand exactly what you want.

Q. I now refer to the conversation you have detailed substantially that you had when you rode to those two places; I am now confining myself to that conversation, and will ask how that conversation began, and what was said, and how it concluded?

A. He asked me to go to ride with him to see the two places; said he was going to buy one for Mrs. Sutton.

Q. Proceed, if you please. Is that all you can recollect of the conversation—what you have detailed just now in answer to my question?

A. Why, we went to see the two places, and he asked me which one I thought the prettier of the two.

Q. What did he say?

A. He said he wanted to buy one for Mrs. Sutton—whichever one she liked the best—whichever one she preferred.

Q. This conversation, as I have understood you to say, was on the ride to the Breck and this other place?

A. Yes, and at the house also; it was freely discussed at all times.

Q. What was said at the house?
A. About the same.
Q. When he had said this same thing at the house how came he to volunteer the same information on the way?
A. Well, it was the burden of the conversation that summer.
Q. You knew, of course, before you left the house what you were going for?
A. Yes.
Q. Fully?
A. Why, yes.
Q. Based upon conversations that you had had at the house?
A. Yes.
Q. Did you start off with that special purpose?
A. To see the Starkweather and the Breck place.
289 Q. And for the purpose of selecting the one or the other.
A. Well, I supposed—perhaps not to select that very day.
Q. No; but to select some other day?
A. Yes; to select one of them.
Q. How long after you had been on the road did this conversation take place which you say took place on your way there?
A. You mean after we left Mrs. Sutton's house?
Q. Yes.
A. Well, it was not so very far to the Starkweather, and it was between the two places.
Q. You first went to the Starkweather?
A. Yes.
Q. And then you went from the Starkweather——
A. Around to Breck.
Q. And during the journey, so to speak, from the Starkweather to the Breck this conversation took place which you have detailed here to-day?
A. Yes.
Q. Please state it again; I want to get it in my mind—the conversation that took place between the Starkweather and the Breck place, to which you already testified on your direct examination?
A. He said he was going to buy one of the places for Mrs. Sutton, whichever she preferred.
Q. When you started from home after dinner that day, had you spoken of going to those two places?
A. Oh, yes; I went specially; the ride was specially to take me to those two places.
Q. If you had had conversation at the house, as you allege, with regard to those places, and if you left your home for the special purpose of seeing those places, and had arrived at the Starkweather, and had left it to go to the Breck place, how came it that Mr. Kenyon then and there interjected that conversation?
A. He did not interject it; it came around in the conversation; it was all the conversation—led up to it and around it.
290 Q. But I understand from you that you had had these conversations of like purport at the house, and that you started from the house for the purpose of seeing those two places?

A. Yes.
Q. You then distinctly knew the object of your drive, did you?
A. Yes.
Q. You looked at the Starkweather place?
A. Yes.
Q. Then you were on your way to the Breck place, according to the intention which you had when you left the house, as far as I understand you?
A. Yes; we were.
Q. Since your mind was fully informed, according to your own statement, as to Mr. Kenyon's purpose and plan, how came he then and there to reiterate that of which you were fully informed before, according to your recollection?
A. Why, he seemed very anxious that Mrs. Sutton should be pleased, and was asking me about it.
Q. But did he seem to suppose that you had forgotten all the information which you had derived from him on that point previously at the house?
A. I do not know what he supposed.
Q. Please state what that conversation was which you say led up to this?
A. I couldn't do it, because it was all house and all grounds and all locality. I don't know.
Q. This conversation which you cannot recollect, do I understand you to be the conversation which took place at the house before you left for these two places that day?
A. Well, it took place many days before we went—every day—some days.
Q. But I have understood you to say, I think not incorrectly, that previous to starting out that morning you understood the object of your starting out?
A. Yes.
291 Q. That it was based upon conversation had before starting?
A. Yes.
Q. Now, I ask this: Whether that conversation that morning was one of the conversations which, as you say, led up to this conversation that took place between the first-named place and the Breck place?
A. Why, yes.
Q. You do not recollect this conversation which took place at the house, as I understand you to say?
A. He talked to me of the two places and why he wanted to buy one of them.
Q. Do you recollect the conversation that took place at the house that morning?
A. Why, it had been hours—we were talking about it.
Q. At what time in the morning of that day did you commence talking about this?
A. Well, it was all day.
Q. After breakfast?

A. Yes.
Q. At about what time did you have breakfast?
A. I guess about eight o'clock.
Q. And the conversation was——
A. It was at the table and away from the table.
Q. Did you discuss this subject fully there?
A. Yes, sir.
Q. In its length and breadth?
A. I guess so.
Q. If you fully understood it at that time, can you give any reason why Mr. Kenyon should have made that direct, explicit statement between this first-named place and the Breck place?
A. It was not the first time that he had mentioned it to me.
Q. Was anything particularly said between the Starkweather place and the Breck place in regard to this matter, or did it take place at the breakfast table and after breakfast up to the time you left?
A. At the breakfast table, after breakfast, and between the places.
292 Q. Please state again what Mr. Kenyon said between those places.
A. That he wished Mrs. Sutton to have whichever one she preferred—wished her to be pleased; that was the amount of it.
Q. Is that the whole of the conversation that took place between those two places?
A. No.
Q. Please state the whole of the conversation that took place between those two places—between the Starkweather place and the Breck place?
A. All the conversation between us?
Q. With regard to this subject.
A. But all the conversation was with regard to it.
Q. How long were you going from the Starkweather place to the Breck place; do you recollect?
A. No; it was quite a ride.
Q. Half an hour?
A. Yes; I should think so, or more.
Q. Were you in conversation during the period that you were going from one place to the other?
A. Yes.
Q. And the conversation was on this subject?
A. Yes.
Q. Now, please state what that conversation was from first to last, as far as your recollection goes?
A. Why, he asked me which place I thought was the prettier; he wanted Mrs. Sutton to have whichever place she liked the best, and was anxious she should be pleased.
Q. Was that the first time that you had seen the Starkweather place?
A. In company with Mr. Kenyon?
Q. At any time.

A. Why, no.

Q. Was it the first time that you had seen the Breck place?

A. No.

293 Q. You have given but a very brief statement to occupy a half hour's time. Please refresh your memory and state what else was said, as it was all on the subject of this matter.

A. We discussed the lake fronts, the grounds, and the house, the location of the rooms, and so on. I can't tell you in detail.

Q. What did you say about the location of the rooms?

A. In those houses they didn't like them.

Q. Which houses do you refer to?

A. The Starkweather and the Breck.

Q. What was there on the Breck place?

A. A little sort of cottage.

Q. Please state what they said about those houses.

A. They didn't like them.

Q. What other things were talked about besides those two houses?

A. How the grounds would look if they were laid out thus and so, and whether they should move such a house off and put another one up; I don't know; all relating to what might be done on those two places.

Q. You have given in detail, of course, specifically, have you, all that was conversed about during that half hour?

A. No; how could I?

Q. How is it that you bear in mind so clearly this "twig," so to speak, of that general conversation?

A. It was the conversation there that summer; it was the conversation here the following winter; and whenever I saw Mr. Kenyon he brought up that subject to me. It was impressed in my mind in that way.

Q. Then, is it impressed on your mind, this particular conversation, these particular words, on account of its having been spoken of previously and subsequently?

A. Yes.

Q. Now, referring to this conversation between this Starkweather place and the Breck place, I wish you would state, if you are
294 able, the conversation; what was said by Mr. Kenyon, what was said by yourself, and what was said by Mrs. Sutton, and not the general outcome of it; I want the conversation in detail.

(Objected to, as having been asked and answered four or five times.)

A. We discussed the houses and the grounds.

Q. We have already had that.

A. There was not any other conversation to relate.

(Question repeated.) "Now, referring to this conversation," etc., as above.

Mr. WESTOVER: He wants the words.

The WITNESS: I couldn't give them.

Q. These precise words, which you have testified to as having

been said by Mr. Kenyon, are they impressed on your mind by the general conversation which you had previously and subsequently?

A. Yes.

Q. How did what was said subsequently impress on your mind what was then said?

A. What part of the conversation do you mean?

Q. What Mr. Kenyon stated there, as stated on your direct examination, in answer to Mr. Westover. Do you recollect what I refer to, now?

A. Do you mean why he was going to buy the place?

Q. Yes.

A. Why, I remember it because he told me so many times.

Q. Mr. and Mrs. Sutton kept house, did they not, during the period you have referred to, at Oconomowoc?

A. Yes.

Q. Were there boarders there in the summer time?

A. I boarded.

Q. And do you not know that Mr. Kenyon boarded?

A. I supposed he did. I have no reason to say that he did any more than a supposition.

295 Q. You never heard anything to the contrary of the fact that he was a boarder there, did you?

(Objected to.)

A. No.

Q. Do you know what is usually paid by the boarders there per week?

(Objected to as immaterial.)

A. I do not.

Q. There were other boaders besides yourself, were there not, during the summer months?

A. Sometimes, yes.

Q. Have you no knowledge of the rates which were paid for board?

(Objected to as immaterial.)

A. No.

Q. Do you know what was the amount of board usually paid in Oconomowoc—not at hotels, but at private houses?

(Same objection.)

A. No; I do not.

Q. Do you know the fact that Mr. Kenyon paid board there at the rate of $10 per week?

(Same objection.)

A. I do not.

Q. The house on Main street which was called the "Hitchcock place," and which was occupied by Mr. and Mrs. Sutton; do you know who was the owner of the place?

(Objected to as immaterial.)

A. Mrs. Sutton.

Q. Do you know whether it was a gift from Mr. Kenyon to Mrs. Sutton?

(Objected to as immaterial.)

A. I do not.

296 Q. Did you ever hear anything on that subject?

A. No, sir.

Q. Directly or indirectly?

A. No.

Q. You are entirely ignorant on that point—as to how Mrs. Sutton became the owner?

A. I understood they bought it.

Q. From whom did you understand this?

A. I don't know.

Q. You cannot say from whom you got the information?

A. No.

Q. You have spoken with regard to the house on 124th street, occupied by Mr. Kenyon and Mr. and Mrs. Sutton. Do you know who furnished the house—supplied the daily necessities?

A. I don't know anything about it; no, sir.

Q. You have no knowledge on that point, whatever, with regard to who furnished the house and provided for it?

A. No.

Q. Do you know whether Mr. Sutton was a boarder there, or whether he resided otherwise?

A. I cannot say. I do not know.

Q. You have never heard anything, have you, from which you inferred that he was a boarder?

(Objected to.)

A. No.

Q. How long after Mr. Kenyon was stricken down were you at the house on 124th street?

A. By noon on Friday. He was taken sick Thursday.

Q. Did I understand you to state on your direct examination that Mrs. Sutton nursed him and cared for him at that time when you were there?

A. Yes.

Q. Do you intend to be understood by that answer as saying that no one else attended to him or cared for him at that time?

A. Nobody while I was there.

297 Q. Was no one present but Mrs. Sutton?

A. Oh, ever so many.

Q. What special care was given to Mr. Kenyon during that period by Mrs. Sutton?

A. His lips were wet, and there was something on his head that was changed several times.

Q. Was he moved in his position at all during the time you were there?

A. I do not think so.

Q. Please state the first day that you were there, so as to fix the time.

A. Friday.

Q. When did you arrive and when did you leave?

A. Well, I left before dark.

Q, What time did you arrive?

A. Possibly at one or two o'clock; I can't say.

Q. How many hours, about, were you there?

A. Between one and two; possibly two.

Q. Were you there the next day?

A. Saturday; yes.

Q. And Monday?

A. Yes.

Q. And how long a period were you there during those different times?

A. Well, always an hour; never less.

Q. And during that time you saw no one attending him but Mrs. Sutton?

A. No.

Q. How were the others occupied—doctors or gentlemen or ladies, or whoever were there?

A. The doctor gave directions to Mrs. Sutton. Well, the ladies were all broken up.

Q. When you say the ladies were all broken up, do you intend to include Mrs. Sutton?

A. No.

Q. Did she manifest any tendency towards breakage?

A. Yes; I think she did.

Q. I understand you say to then that from your observation the condition of all the ladies who were at the house at the time, with the exception of Mrs. Sutton was ——

A. They were feeling very bad.

298 Q. Well, did not Mrs. Sutton apparently feel bad?

A. Yes.

Q. What was the difference, in that regard, between Mrs. Sutton and the others?

A. Well, they sat with their faces buried in their handkerchiefs and she did not.

Q. Was she alone of all the ladies who sat in that attitude?

A. I didn't sit in that attitude.

Q. Of course I did not mean to include yourself. Now, from all you saw there during those three days until the time of the death, do you intend to say that Mrs. Sutton so entirely attended to Mr. Kenyon's wants, and that the others refrained from so doing that you are able to state, as you have upon your direct examination, that Mrs. Sutton nursed him and cared for him—took sole care of him?

A. She did while I was there.

Q. And no one else ministered to him; is that so?

A. I don't think I saw any one else.

Q. Were any gentlemen present?

A. Yes; Mr. Sutton was there and I think a relative of Mr. Kenyon's.

Q. Did they do anything?

A. No; the gentlemen were asleep on the sofa?

Q. On the three several days that you were there?

A. Most of the time. When he was not asleep he sat with his eyes closed.

Q. Where did Mrs. Sutton sit?

A. By Mr. Kenyon's bedside.

Q. Was she up and around, or did she confine herself to that place?

A. I supposed she moved when it was necessary.

Q. I mean was she around about the room at the time that you were there?

A. Not much; no.

Q. Well, was she at all?

A. Well, I think likely; yes, somewhat.

299 Q. Was the seat that she occupied by the side of Mr. Kenyon entirely vacant during the time that she was around about the room?

A. I think it was.

Q. You said that you saw these plans and specifications at the house at 124th street?

A. I did.

Q. Was that the occasion when Mrs. Freeman, the witness who has been examined here, was present?

A. I don't remember her being there at the time.

Q. You heard her deposition here the day before yesterday?

A. Yes.

Q. In regard to her being present at the house on 124th street and seeing the plans; were you there on that occasion?

A. I don't think so.

Q. You have stated on your direct examination, referring to Mr. Kenyon's whereabouts at Oconomowoc, that where he went Mrs. Sutton went?

A. Yes.

Q. Did you mean by that to be understood as saying that whenever Mr. Kenyon went upon the streets of Oconomowoc, or went forth for pleasure or recreation, Mrs. Sutton accompanied him?

A. Not always Mrs. Sutton, but always some one was with him.

Q. I understood you to say on your direct examination that where he went she went; that is not correct, then, is it?

A. Well, yes; if she didn't go individually she saw that some one went with him.

Q. Then when you say that where he went she went, you think that that answer will cover a state of facts like this; that if she did not go, somebody else went in her place?

A. Well, I don't know as anybody ever went in her place. We used to all go. I think I said that we all went.

Q. Did you intend to say on your direct examination, as you did, that where he went she went—referring to Mrs Sutton?

A. I do.

300 Q. And when you say that, you wish to be understood that when he went you all went; is that so?

A. No; I do not.

Q. Please explain, because there seems to be a discrepancy in your answers on that point.

(Objected to.)

A. When he went out, in Oconomowoc, off the place, Mrs. Sutton usually went with him, but when he went out on the lake, or around the place, almost always some of the rest of us went with him.

Q. When you say "off the place" you refer to the place on Main street?

A. Yes.

Q. Who attended to Mrs. Sutton's domestic duties there—herself?

A. Her servants.

Q. And was she entirely free from the care which devolves upon the head of a household?

A. When?

Q. During the time she was there.

A. All day long, every day?

Q. Yes.

A. I suppose she would devote a little time in the mornings, as most housekeepers do, to it.

Q. Did Mr. Kenyon ever go out in the morning?

A. I never knew him to.

Q. And was this owing to the fact that Mrs. Sutton could not go out?

A. He did not want to go; I never knew him to go.

Q. Did I understand you to say that he did not go out until Mrs. Sutton was at liberty?

A. I don't think he did.

Q. Did she always accompany him on the street during the period that you spent in Oconomowoc?

A. I think she did; as far as I know she did.

Q. And do you know the object and purpose of her so accompanying him?

A. He had a horror of being left alone; he told me so.

301 Q. Did that state of facts exist while he was here in New York?

A. I could not say.

Q. As far as your observation and knowledge goes?

A. I never heard him express himself here.

Q. How do you know that he had a horror of going alone at Oconomowoc?

A. Because he told me he was afraid of the next attack, whenever it might be, and of dying in the street.

Q. I want you to make this very particular; please state whether this state of facts existed when you went to Oconomowoc in 1875?

A. What state of facts?

Q. That he was not in the street except in company with Mrs. Sutton?

A. Oh, yes; he would go out sometimes; once in a while he would go without.

Q. Very seldom?

A. Yes; I suppose he had no occasion to go; I don't know.

Q. Did you ever see Mr. Kenyon during the time you were there in 1875 and the year subsequent on the streets of Oconomowoc unaccompanied by Mrs. Sutton?

A. I don't recollect any time.

Q. Do you recollect many times when you saw him accompanied by Mrs. Sutton?

A. Oh, yes.

Q. And your conviction at the present time is that you did not see him at any time unaccompanied by Mrs. Sutton on the street?

A. I don't remember.

Q. You don't remember any time?

A. I don't remember any time.

Q. You say that he said he had a horror of being alone; what period of the year 1875—

A. It was in 1878 that he told me that.

Q. In 1878 he said he had a horror of being alone?

A. Yes.

Q. And that he was fearful of the next attack; is that so?

A. Yes.

302 Q. What was it, if you are able to state, that stood in the way of his going on the street except in company with Mrs. Sutton during the previous years, as far as your observation went?

A. I don't know at all.

Q. Only you have knowledge of the fact—

A. That they were together.

Q. Always on the street?

A. As far as I know.

Q. Now, was this due to the fact that Mrs. Sutton wanted to be in his company, or that he desired during that period to be in her company?

A. I don't know.

Q. Is it not rather your conviction that during those early years it was her desire to be in his company?

A. I haven't any conviction.

Q. No conviction?

A. No, sir.

Q. You find here two persons—a single man, on the streets with a lady, and at no time unaccompanied by him in the streets of Oconomowoc, and you have no conviction of the reason for such a state of facts?

A. No.

Q. Is it surprising to you?

A. No.

Q. Was Mr. Sutton residing at Oconomowoc during that period?

A. He usually went along also.

Q. When you have stated here in answer to these many questions that Mr. Kenyon never went on the streets of Oconomowoc, as far as you recollect, without being accompanied by Mrs. Sutton, you intended to include Mr. Sutton?

A. Yes. You didn't ask me as to anybody else.

Q. Was anybody else in company?

A. Well, very often I was along.

Q. Now, I am going to confine myself to those times, if there were any, when Mr. Kenyon and Mrs. Sutton were together on the streets of Oconomowoc alone. Were those times numerous?

A. I don't know as I ever saw them on the street alone.

303 Q. Therefore they were always in company with others—either yourself or Mrs. Sutton or some one else?

A. Or some of their neighbors or some one; usually some one.

Q. So Mrs. Sutton did not accompany him on the streets alone?

A. Not always.

Q. I understood you to say a moment ago that you had never seen them on the streets alone?

A. I had not seen them alone.

Q. Please state during the times you were in Oconomowoc where you went and what you did when Mr. Kenyon was present?

A. He would usually say: "Hadn't we better take a little walk?" and we would go together for a walk.

Q. You went for a walk; you did not go then for fear that Mr. Kenyon, on account of his feebleness of health, was afraid to be on the street alone?

A. Mr. Kenyon was in Mrs. Sutton's care. She might have gone to take care of him; I went because I was invited.

Q. Please state what you mean by the statement that Mr. Kenyon, in 1875, was in Mrs. Sutton's care. Was he in such a feeble condition that he required the care and attention of Mrs. Sutton—as you say he was in her care?

A. He told me she had promised to take care of him, and he always called upon her.

(The last clause of the answer is objected to, and motion made to strike it out.)

Q. What is Mrs. Sutton's age?

A. I don't know.

Q. Don't know the age of your own sister?

A. No.

Q. Have you never heard?

A. Yes.

Q. Did you not reside with your sister during many years—during your earlier years?

A. Most of them, I guess.

Q. Mrs. Sutton is your oldest sister?

A. Yes.

304 Q. Do you not know what the age of Mrs. Sutton is?

A. No.

Q. Can you approximate it?

A. No.
Q. She is 54 or 55; that is a fact, is it not?
A. I can't say.
Q. You do not know the contrary to be the fact?
A. No.
Q. Do you know the age of Mr. Kenyon?
A. No.
Q. If his age was, as it was in fact at the time of his death, 68, would you consider that he was old enough to be her grandfather?
A. No.
Q. You stated here a moment ago, though it was not taken down by the stenographer, that you considered Mr. Kenyon old enough to be Mrs. Sutton's grandfather, did you not?
A. But I took it back; it was merely an exclamation.
Q. You withdraw it now, do you?
A. Certainly; I did not mean that to go down at all.
Q. You say that when Mr. Kenyon wanted anything Mrs. Sutton cared for him?
A. She did.
Q. Did he ever want a glass of water while you were there?
A. Lots of times.
Q. What did he say?
A. He would say: "Sarah, I want some water;" and then she would get it.
Q. Did you ever know him to get water alone?
A. I never knew him to.
Q. And where would he be when asking such questions.
A. Sometimes up-stairs; sometimes down-stairs; sometimes out on the grounds.
Q. And would he call from up-stairs, "Sarah, I want a glass of water?"
A. If he was up-stairs. He was generally where the rest of us were.
Q. He never asked you for a glass of water?
[A.] He had better not. I was not feeling very strong myself.
Q. What other things did he seem to need—you say whenever he needed anything he called for Mrs. Sutton?
305 A. He had a great deal of headache, and had always something that was put on his head; I don't know what it was, and she always did it, and then she shook up his pillows.
Q. I now allude to times when he was not so suffering; if he wanted his hat did he ask Mrs. Sutton for it?
A. No; he got it himself; but if he wanted his papers, and they were up stairs and he down, he would ask Mrs. Sutton for them.
Q. Please state the reason of his inability to get the papers himself.
A. I think he did not like going up and down stairs.
Q. What other things that he wanted did Mrs. Sutton do for him?
A. Why, if we were going out in the boats, and he wanted a heavier coat or a cushion to sit on, or anything under heavens that a man could want, he would ask her.

Q. Please state his condition of health during those various times when he was going rowing or at other times, whether his condition of health was such as to require such care as he requested and received from Mrs. Sutton, as you allege.

(Objected to.)

A. He led us to suppose he did.

Q. He led you to suppose he did?

A. Yes.

Q. Please state what you mean by that—explain it.

A. He always spoke of himself as being unable to go up and down stairs; it hurt his head; he could not walk far, for it hurt his head; he could not go in the sun, for it hurt his head.

Q. How far could he walk?

A. I do not know; not far, as I ever saw.

Q. Could he walk two city blocks?

A. I never knew him to.

306 Q. These excursions that were made in Oconomowoc, would you limit them to two city blocks?

A. We generally went across the lake and came back again. When we walked it was a broad country road; we did not go far.

Q. And his condition of health was such that he was not able to walk two blocks?

A. I do not know whether he was or not.

Q. But he so manifested himself?

A. He led us to suppose when he called for things or didn't go any distance that he was not able to.

Q. If he was going out on the lake, and wanted his coat, how did he lead you to suppose that he needed such care?

A. By calling upon a lady to wait upon him.

Q. You think, then, that if he had been in a fair state of health he would not have called upon a lady to wait upon him on those occasions?

(Objected to.)

A. I don't think he would, and strangers, too.

Q. What strangers did he call upon?

(Objected to.)

A. He called upon my little girl many times to go back to the house and get him things.

Q. Did he ever call upon you?

A. No, sir; I considered myself as weak as Mr. Kenyon.

Q. You considered yourself what?

A. I considered myself weak; I was there for my health, also; whenever I was there it was for my health.

Q. How far did you ever walk on the streets of Oconomowoc?

A. I don't think I ever walked three blocks; I know I didn't.

Q. When you say you didn't walk three blocks, do you confine it to street blocks?

A. City blocks; yes.

Q. You never knew Mr. Kenyon to walk three blocks?

307 A. I don't know that he ever walked two full blocks; he may have; I never knew him to.

Q. When you say two blocks, you mean city of New York blocks —200 feet?

A. Yes; these ordinary blocks.

Q. And that condition of health continued during the year 1875 and those other years that you were in Oconomowoc?

A. He was worse the last two years that I was in Oconomowoc?

Q. So that these weaknesses, toward the end, increased rather than diminished?

A. Yes.

Q. Where do you reside in the city of Brooklyn?

A. At 83 Woodhull street.

Q. How far is that from the ferry?

A. I don't know; seven or eight blocks, I guess.

Q. From the South Ferry?

A. Yes.

Q. Did you ever know Mr. Kenyon to walk from your house to the ferry?

A. I never knew him to.

Q. He always took the cars?

A. As far as I know; I never crossed the ferry with him.

Q. During the times that you met him at your house at Brooklyn, did his need of care and assistance seem to be as great as it was during the time of which you testified, in Oconomowoc?

A. Yes.

Q. During the times you met Mr. Kenyon at his house on 124th street, the same?

A. Yes.

Q. Did Mr. Kenyon ever, at any time, say to you that on account of these servies which you have detailed as having been necessarily performed by Mrs. Sutton for him he desired to purchase this property for her?

A. He stated—yes—for the care she had already given to him and for the care she had promised to give him.

Q. The care which she had already given to him?

A. Yes.

308 Q. Do you refer to the services which you have already stated here—as to services rendered by her, and the necessity of those services?

(Objected to.

A. He did not tell me what care; he merely said for the care she had given and for the care which she also had promised.

Q. When was this said?

A. Why, he said it to me in Oconomowoc; he said it to me in 124th street, and he said it to me in my own house.

Q. What place was it?

A. At Oconomowoc.

Q. At the time you have testified to, that you went to the Breck place and the other place?

A. And previous.

Q. And at his house at 124th street?

A. Yes.

Q. And at your house in Brooklyn?

A. Yes.

Q. What did he say?

A. That he wished this place—to buy a place for Mrs. Sutton; he wanted her to have it, as she wished to. Is that what you mean?

Q. What did he say at Oconomowoc on that point?

A. That he wished to buy a place for Mrs. Sutton. Do you mean that?

Q. Yes; what he said at Oconomowoc on that subject?

A. And he wanted to give her whichever one she liked best?

Q. Where was that?

A. At Oconomowoc.

Q. In what year?

A. In 1879.

Q. You say he said it in your place in Brooklyn?

A. Yes.

Q. What did he say there?

A. Just about the same.

Q. When was that?

A. The following winter—1879–80.

Q. You say he also said it at 124th street; when was that?

A. The same winter.

309 Q. The winter of 1880?

A. 1879–'80, I suppose it was.

Q. Was that the winter that he died that he said it last?

A. No; that was the winter before he died.

Q. Did he ever speak of it subsequent to that time?

A. Yes.

Q. When did he speak of it last?

A. The very Wednesday before his death.

Q. What did he say then?

A. That he had bought the place—that it was for Mrs. Sutton; in speaking of it, to make her home there for the care she had given him and for the care she promised to take of him until his death.

Q. This last conversation was at the house on 124th street?

A. Yes.

Q. Please detail that conversation; you have given only a very brief statement in regard to that. What were the surroundings; what called forth the conversation?

A. The plans were on the table, and we were talking of the house—what rooms we should occupy next summer. He had invited us to come on; he insisted upon our coming on to visit Mrs. Sutton, and Mrs. Sutton was joining him in pressing us to come on for the summer.

Q. What did Mr. Kenyon say when he insisted that you should come on there and stay at the Breck place?

A. Why, he said that Mrs. Sutton could entertain us so much better—give us better accommodation than she ever had before, and that it would be pleasing for her to have her own family as boarders than to have strangers.

Redirect examination by Mr. WESTOVER:

310 Q. Do you know the gentleman who has cross-examined you?

A. Yes.

Q. Who is he?

A. Mr. Erastus Brown.

Q. In what relation does he stand to this estate as officer?

A. Executor.

Q. Is he related to the family of Mr. Kenyon?

A. He is Mr. Kenyon's brother-in-law—his sister's husband.

Q. Who is the attorney who is entered here as attorney of record?

A. His son.

Q. Why did you not visit Oconomowoc the last two years in the summer, the same as you did previously? Can you tell?

A. Well, it was a good way to go, for one thing. In 1880 I went to Europe.

Q. Well, in 1881?

A. We were waiting for the new house to be finished before we went again.

(By consent the signature of the witness is waived.)

WILLIAM E. WHITE, being duly sworn and examined, testifies as follows:

Direct examination by Mr. WESTOVER:

Q. Where do you reside?

A. In Brooklyn.

Q. What is your business?

A. I am a merchant, doing business at 595 Broadway, New York city.

Q. You are the husband of the last witness?

A. Yes; the husband of Julia L. White.

Q. Did you know Mr. Kenyon in his lifetime?

A. I did.

Q. How long had you known him?

A. Some 22 or 23 years, I think.

Q. Did you ever meet him at Oconomowoc?

A. I did.

Q. When?

A. In the year 1875, I think.

Q. Do you know anything about these places there at Oconomowoc; do you know the Breck place?

311 A. I know where it is located, from the fact that my attention was called to it as a nice location for a house.

Q. How long were you in Oconomowoc in 1875?

A. Not over ten or fourteen days or thereabouts.

Q. Did you stay at the house of Mrs. Sutton while you were there?

A. I did.

Q. Was Mr. Kenyon there?

A. He was.

Q. Do you recollect Mrs. Sutton and Mr. Sutton and Mr. Kenyon residing in New York in the winters of 1879–'80, 1880–'81, and 1881–'82?

A. I do.

Q. On 124th street?

A. Yes.

Q. Did you ever visit their house there?

A. Yes.

Q. When?

A. Well, they came to reside at my house, I think, in the winter of 1879–'80, and on my return from Europe they had removed to 124th street; they were there when I came back. I called there soon after, and I suppose at intervals once in two weeks I was there during that winter, until they went West. The following winter they came on in the fall. I was there a few times before I went to Europe, and on my return in February I was there again. Occasionally, until they went West, they were in the habit of coming to our house about every other week, or oftener, and I went there once in two weeks generally. Then they came on the following fall and I was there, I think, a few times before I went away, and on my return it was after Mr. Kenyon's death. I don't think I was there afterwards.

Q. You were not present in the city during his last sickness?

A. No; I think I was on my way home.

Q. Did you observe, during your visits to the house, the apparent condition of Mr. Kenyon?

(Objected to as calling for the answer of an expert.)

A. I think, and it was the subject of conversation between us—Mr. Kenyon and myself—

Q. What was the subject of the conversation?

312 A. He told me that his head was troubling him a good deal and that he found he was not what he once was. He told me that the last time I saw him.

Q. Did you ever see him suffering at the times at which he spoke?

A. I have.

Q. How did he complain?

A. His complaint was of his head; he so stated.

Q. Do you know whether during that time—those years—he looked to any particular person for nursing or care during his indisposition?

(Objected to as leading, and generally.)

A. I do.

Q. To whom did he look?

A. He told me himself that he looked to Mrs. Sutton for his care; that he hoped to be able to make his home with her as long as he lived.

Q. Did he give you any reason for that beyond what you have already mentioned?

A. I do not remember, except that he felt more at home with "Sortie" and "Charlie" than with anybody else.

Q. By "Sortie" he meant Mrs. Sutton?

A. That is the name she is always known by in our family, and I put it in that way because those were his words.

Q. Did you have any conversation with him or the members of the family in his presence in regard to the Breck place?

A. Never but once that I can recall.

Q. State when it was and what it was.

A. This particular conversation that I had with him occurred in the spring, or rather in February, I should say, of 1881, at the house in 124th street; I was spending the evening there; the plans were brought out and were discussed at some length.

Q. The plans of the house?

313 A. The house that was being built on what was known as the Breck place. Mr. Sutton was there and Mrs. Sutton, and I think my wife and my wife's sister and Mr. Kenyon. I think that they had been discussing some alterations in the plans, or what alterations had been made since I had seen them before, and, finally, Mr. Kenyon and I were left discussing the matter alone. He asked my opinion about these plans, this and that, and I gave my views as a disinterested party, and he finally said, said he, "It is immaterial to me; I am building this place for Mrs. Sutton and I wish to have it to suit her." That was the remark he made to me at this time.

Q. You had seen those plans previously?

A. I think I saw the plans the fall before I went to Europe; that same fall. I do not remember exactly what state they were in. I paid very little attention to them prior to that time.

Q. Who made those plans?

A. Mr. Sutton.

Q. In the fall before you went to Europe you saw them, and this was in the latter part of the winter, after you returned?

A. This was in February of 1881.

Q. Was there any further conversation that you had with him that you recollect?

(Objected to, as the witness has already testified that he only recollects one conversation, and he has detailed it.)

A. Not particularly. There was general conversation about the house constantly, but it was a matter that I did not tax my mind with, not feeling an interest in it; but this conversation I particularly remember, and it was particularly fastened on my memory.

Q. Do you recollect, now, any of the details of the house that were discussed?

A. I do.

Q. State some of those.

A. There was a discussion of the arrangements of the rooms up stairs.

Q. What was that?

314 A. The room of Mr. Kenyon, adjoining that of Mr. and Mrs. Sutton, and also some conversation about a billiard-room. Mr. Kenyon made the remark that those were the two rooms that he felt most particular about.

Q. The billiard and the bed room?

A. His own sleeping apartment and the billiard-room,

Q. Was any reason given at that time for that?

A. Yes; he said he wanted his room near Sortie's and Charlie's.

Q. Do you know how his room was arranged or situated as to the room occupied by Mrs. Sutton at the cottage in Oconomowoc when you were there in 1875?

A. When I was there in 1875, if my memory serves me aright, myself and my wife occupied a room adjoining Mr. Kenyon's, which, I understand, was their room generally, but, that as the house was full, they were occupying a little room across the hall.

Q. And they gave that room for your use?

A. They did for our use while I was there. I was there but a few days; my wife and child remained for the summer, I think.

Q. Is there anything else of importance to the parties in this suit that you know that I have not questioned you about?

A. Only so far as Mr. and Mrs. Sutton feeling that they could not leave him alone. One circumstance came up—

(Objected to by defendant's counsel, unless the witness shows that Mr. Kenyon was present with Mr. and Mrs. Sutton.)

Answer continued: I asked them both to come over while I was there at their house. I said to them, "I am going away," and I said, "Run over and spend as much time as you can with my family;" and Mr. Sutton made the remark that it depended a great deal upon Mr. Kenyon; that it was impossible for them

315 to go unless they took him with them; that they didn't like to leave him alone, as the doctor had told them that since his attack a year or two previous he was liable to have another one; but I do not remember whether Mr. Kenyon was in the same room or in the back parlor; that I could not be positive about.

(Defendant's counsel moves to strike out the answer last given.)

Q. Was he within hearing at the time?

A. He was in the room—the parlors all joined—that is, it was one long parlor and the folding door opened back; he was there; it was the last evening previous to my departure.

Q. He was in the parlor where the conversation took place?

(Objected to.)

A. That I could not positively say. He was there. I remember it because I was just about leaving.

Q. Was he within hearing?

(Objected to as leading, and on the ground that the witness has already testified that he did not know where Mr. Kenyon was.)

A. I should judge he was. His exact locality I cannot exactly testify to; it would be impossible for me to do that.

Cross-examination by Mr. BROWN:

Q. The parlors were front and back parlors?
A. Yes.
Q. Where did you stand, with reference to Mr. and Mrs. Sutton?
A. I stood more, I should judge, than half-way back, towards the rear of the building, in the front parlor. I was standing nearer the folding doors than I was to the pier glass.
Q. How many feet from the folding doors in the front parlor were you?
A. I should judge that I was about 12 feet.
316 Q. And where did Mr. and Mrs. Sutton stand?
A. They were standing right around me.
Q. Please state in what part of the room Mr. Kenyon was.
A. That is impossible for me to state exactly, but it was right in the immediate vicinity.
Q. Do you recollect now having seen him there at that time?
A. Oh, yes.
Q. He did not take part in the conversation, you say?
A. No, I think not. We were just about going, and I was going to say "Good-bye" to them.
Q. Was he in the back parlor?
A. That I can't tell you, as I have testified I could not say exactly where he was, but he was there with the company.
Q. You cannot now state whether he was within hearing distance or not?
A. That I could not positively swear to.

(Defendant's counsel moves to strike out all that this witness has testified in regard to that conversation with Mr. and Mrs. Sutton at that time.)

Q. When were you first in Oconomowoc?
A. In 1875.
Q. How long were you there?
A. Only ten or fourteen days, I think; something like that.
Q. You were residing at the time with Mr. and Mrs. Sutton—staying at the same house?
A. I was spending just a few days there. I went out there just to take my family out there and leave them. I went out there just for a few days and returned. It was the only time I have ever been in Oconomowoc. I spent a few days there at that time.
Q. During the time that you were there, did Mr. Kenyon and yourself and the members of the family go on any excursions?
A. Yes.
Q. Where did you go to, please?

A. We took a sailboat and went up the lake; we were in
317 the habit of going up the lake—the lake was two or three miles long—to a sort of island there; sometimes we would land, and sometimes we would not.

Q. You are referring now to 1875?

A. Yes.

Q. Did you during those periods take a sail up to these various points on the lake, and go in the woods around?

A. I believe we did once, but I do not think Mr. Kenyon was along.

Q. Did you ever while you were there take walks through the streets of Oconomowoc?

A. I did.

Q. Did Mr. Kenyon ever accompany you?

A. I have no recollection, unless it was that we went to church one Sunday.

Q. That is the only time you recollect now of being on the streets with him?

A. I do not recollect any other time. I think he went to church with us that Sunday morning I was there.

Q. Did you ride or walk?

A. We walked.

Q. How far is the church from the house?

A. I do not remember—not very far.

Q. Half a mile?

A. Oh, no.

Q. Well, you can tell pretty near?

A. Well, it is not a distance I would reckon by miles at all.

Q. How far would it be?

A. Well, I have not been in Oconomowoc since 1875, and my memory is a little dull on that, but I should judge it was not more than five minutes' walk.

Q. How many blocks can you walk in five minutes?

A. Well, I can walk four miles an hour, easily.

Q. How many can you walk in five minutes?

A. Well, it is according to what I am going for.

Q. Going to church, for instance?

A. It would depend on whom I was walking with. When I am alone I walk about twice as fast as when with my wife or
318 other people. I think I could walk in five minutes in the company of Mr. Kenyon—well, I don't think I should walk over three or four or five blocks at the outside; three or four blocks, I should think.

Q. How long were you there?

A. About ten days.

Q. You cannot tell whether you were there more than one Sunday or not?

A. I do not think I was more than one. I may possibly have been, but I do not think so. I recollect about that going to church.

Q. Will you please state again the conversation you had on 124th

street, which you have detailed, and which you have said was the only conversation you recollect.

A. Along in the evening these plans were brought out, and we had all been discussing them—that is, they had been discussed in the presence of Mr. and Mrs. Sutton and Mr. Kenyon—I don't know but my wife and my wife's sister was there—and they were explaining the plans and we were discussing the merits and demerits of the house, and finally Mr. Kenyon and I were left alone at the little table in what is called the back parlor, and the plans were spread out there and we were discussing them. Mr. Kenyon made the remark to me that it was immaterial to him particularly about the arrangement of the house—that he was building the house for Mrs. Sutton, and he wished it to please her; that the two most important rooms that he cared about were the billiard-room and his own room. At that time Mr. Kenyon and I were alone, end he said that he was building this for "Sortie"—that is, Mrs. Sutton.

Q. In what year were you at Oconomowoc?

A. In 1875.

Q. Have you on your direct examination referred to the arrangement of the bed-rooms?

A. In the cottage?

319 Q. Yes; on Main street.

A. Yes.

Q. What did you observe there?

A. I observed—I received the impression——

Q. Do not state your impression.

A. Well, I understood that we were occupying what was called Mr. and Mrs. Sutton's room for the time being; that while our room was front Mr. Kenyon's room was just adjoining—back—I know that was called his room.

Q. Please state as to the apartments on the first floor as nearly as nearly as you can, down stairs.

A. Entering the front door from the street——

Q. Facing on the south?

A. That I don't remember. Well, the front door is on the east; you enter that door on the east; the parlor is on the right, and, if I remember aright, a little sort of reception-room or sewing-room on the left, behind which was the dining-room, running, I think, across the house. Beyond that the kitchen, which was an extension built on recently, I think, when I was there, and over the kitchen was the billiard-room; then, going upstairs, in the front hall you come to a room over the parlor, which was one of the rooms occupied by myself, which was a front room. The back room was Mr. Kenyon's room—back of that front room which I have reference to. I do not remember exactly the arrangements on the other side of the hall—whether there were one or two rooms, but they were small rooms, I think. Well, beyond those—beyond the line of Mr. Kenyon's room—was a small room that Mr. and Mrs. Sutton occupied—I don't remember exactly, but I think they occupied a little room across the hall while I was there; and beyond that led a passage to what was called the billiard room, over the kitchen.

Q. This room which Mr. Kenyon occupied, or his room, was opposite the room which Mr. and Mrs. Sutton occupied, or which was their room?

320 A. I judge that these two rooms formed what was over the parlor. I know that there was a window opening out onto the lake.

Q. That is on the rear?

A. Yes; I know that from the fact that one day he was there and we were on the lake and we were waiving our hats to him—one day when he was not able to come downstairs.

Q. Which room was Mr. and Mrs. Sutton's—the lake room—the rear room?

A. The front room; and while myself and wife were there, for the time being, as we understood, we occupied it, but it was only for the time that we were there, I think, that we occupied—

Q. But it was a fact that the rear room was Mr. Kenyon's regular room?

A. Yes.

Q. And the other room adjoining was Mr. and Mrs. Sutton's?

A. Yes. The rooms were simply separated by the door.

Q. Instead of being separated by a sliding door they were simply separated by a small door, were they?

A. A door that opened regularly on hinges.

Q. Were the toilet accommodations in a recess?

A. Oh, no; simply a partition, as you would find in an ordinary country house.

Q. So, really, one room opened onto the other?

A. Yes; just simply a common partition and door between. There was also access to each room from the hall.

Q. Please state the size of the other rooms on the sleeping floor.

A. I could not state the size. My impression is they were small. I should judge that those two rooms were about the only two full-sized sleeping rooms in the house.

Q. Did you ever go through the house on 124th street?

A. I have been in the basement, the parlor, and the second story.

Q. I will not inquire as to the basement. On the parlor

321 floor there are two rooms—a front and back parlor and closets?

A. What would be called the parlor and the extension—which would be used as a dining or sitting room or back parlor. I remember it was used as a sort of library; he had his book-case there.

Q. With regard to the upstairs there was one large front room, was there not?

A. Yes.

Q. And a large back room?

A. Yes; I never was there but once; upstairs.

Q. And a bath-room?

A. Yes; a bath-room adjoining the back room.

Q. So that on the second or sleeping floor there was the back room and a bath-room and a front room?

A. I think so.

Q. Do you know which of those rooms Mr. Kenyon occupied, and which Mr. and Mrs. Sutton?

A. I understood that Mr. Kenyon occupied the front room.

Q. And Mr. and Mrs. Sutton back?

A. Yes. I remmember that fact being impressed on my mind by my little girl staying there one night and sleeping with Mrs. Sutton.

Q. Between those rooms there were three doors, were there not; a door that divided the front room from the standing basins, toilet arrangements, and Croton water, and the same accompaniments connected with the back room?

A. That I cannot speak fully of. I do not remember passing into the back room that way. I remember going into the back room by the door at the head of the stairs, and I remember that the room seemed to me rather small. I remember where the bed stood, and a little cot being put up for my little girl alongside of their bed, and I remember being in the front room, but how I got there I can't tell you, and I don't remember the connection between them.

322 Q. Of course you did not see the floor above?

A. I don't think I was ever up in the third story.

Q. The two rooms you refer to in Oconomowoc, the large front room and the large back room, the one occupied by Mr. Kenyon and the other by Mr. and Mrs. Sutton, were the best rooms on the floor?

A. I judged that they were the best sleeping-rooms in the house; if my memory serves me aright there were two small rooms besides; what I speak of as a sort of sewing-room downstairs, a reception-room, and the dining-room. I don't remember exactly how that was arranged, but the house seemed to be built with an addition.

Q. You have stated that Mr. Sutton prepared or made the plans; did he draw the plans or specifications of the house?

A. The specifications I do not remember much about. I remember seeing him working on the plans; it was a matter, as I told you, that I did not take much interest in, and I do not think I ever entered into the spirit of it except that one night when Mr. Kenyon and I were discussing the merits and demerits of the house.

Q. Did you ever hear Mr. or Mrs. Sutton in Mr. Kenyon's presence say, or did you ever hear Mr. Kenyon say, that the specifications were drawn up by Koch & Co., of Milwaukee?

A. No; wherever I got my information from I always understood that they were prepared by Charlie.

(By consent the signature of the witness is waived.)

323 (Title of the cause.)

Deposition of M. T. DRAPER, a witness on the part of the plaintiff in the above-entitled action produced, sworn, and examined the 13th day of October, 1882, at Draper Hall, the place of abode of said M. T. Draper, in the city of Oconomowoc, Waukesha county, Wisconsin, before R. C. Hathaway, a court commissioner in and for Waukesha county, in the State of Wisconsin, pursuant to notice therefor, dated October 10th, 1882.

Present: Hurlbut & Van Alstine, appearing as attorneys for the plaintiff; Jenkins, Elliott & Winkler, appearing as attorneys for the defendants; Erastus F. Brown and Francis A. Kenyon, as executors of the will of John S. Kenyon, deceased, and trustees of his estate under the will.

M. T. DRAPER, being first duly and publicly sworn pursuant to the statute in such cases made and provided, and examined on the part of the plaintiff on oral interrogatories, doth depose and say as follows, viz:

Q. Where do you reside, Mr. Draper?
A. In the city of Oconomowoc.
Q. How long have you resided here?
A. Fourteen years.
Q. How old are you, Mr. Draper?
A. Sixty-eight years.
Q. What is your general health?
A. Good.
Q. At the present time you are laboring under a debility and unable to perform manual labor, and under the doctor's care?
A. I am.
Q. Are you acquainted with the plaintiff in this case, Sarah S. Sutton?
A. I am.
324 Q. Were you acquainted with John S. Kenyon in his lifetime?
A. I was.
Q. How long were you acquainted with him, or about how long?
A. I think about eight years, but I know as many as five. He boarded with me occasionally.
Q. Where were you acquainted with him?
A. Here in this house and at their residence. Never made much acquaintance at their own residence; used to go in for an evening call occasionally.
Q. Were you intimately acquainted with him?
A. I don't think my acquaintance with him would come under the head of intimate.
Q. You may state what acquaintance you had with him.
A. I had a neighborly and business acquaintance with him.
Q. I would ask you to state about where and when you last saw him?
A. A year ago this last September, if they went away in September; if not, it was in October a year ago. It was shortly before they went away.
Q. Did you have a conversation with him about that time?

(Objected to as immaterial and irrelevant.)

A. Yes.
Q. You may state the conversation.

(Objected to as immaterial and irrelevant.)

Question withdrawn.

Q. You may state if you had a conversation with John S. Kenyon in relation to his matters with Sarah S. Sutton, the plaintiff; if so, state what it was.

(Objected to as immaterial and irrelevant.)

A. Yes. Mr. Kenyon was walking back and forth on the street. I asked him in the office, where there was a fire. He came in and he kept getting up and looking out. I asked him who he wanted to find. He said, Mrs. Sutton. We went out and down to
325 the lake shore. Then he went on making an excuse. He said he had heard there was gossip; no one had said anything to him; there had been nothing done, nor there would be nothing done, about that house but what Mrs. Sutton would be the boss of, and nothing but what she would dictate, and that is what I want of her now; I want her down there to-night before the carpenters break up to give her orders. Nothing material was further said; I have stated all that I remember.

Q. How long was this before he went to New York?

A. A few days; it may have been six or eight days.

Q. Where was he living at that time?

(Objected to as immaterial and irrelevant.)

A. Here in this city with Mr. and Mrs. Sutton.

Q. You may state whether Mr. Kenyon, soon after this conversation, went to New York.

A. Yes, sir; that was the report; he said he was going.

Q. You may state what, if anything, Mr. Kenyon said in relation to his making his future home with Mrs. Sutton.

(Objected to as immaterial and irrelevant, and also upon the ground that it assumes facts not disclosed by the witness.)

A. He came in two or three times, and said I intend to make my home with Mrs. Sutton here instead of New York; the climate was such that he could do something here, and he could not in New York.

Q. You may state what, if anything, he said as to how long he was going to make his home with Mrs. Sutton.

(Objected to because incompetent and irrelevant.)

Question waived.

MARTIN T. DRAPER.

326 *Depositions of Witnesses for Defendants.*

(Title of the cause.)

NEW YORK, *June 1st*, 1883.

Hearing resumed.

Present: Counsel as before, and Mr. E. F. Brown, one of the defendants, in person.

SAMUEL B. KENYON, a witness called on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?
A. In Harlem, New York city.
Q. Please state the street and number.
A. 307 East 118th street.
Q. What is your business?
A. Real estate and insurance.
Q. Where is your office situated?
A. At 2223 Third avenue.
Q. That is on the corner of what street?
A. 121st street.
Q. Do you know the parties to this action—the executors of John S. Kenyon, deceased, and Mrs. Sarah S. Sutton?
A. I do.
Q. Do you know Mr. Charles T. Sutton, the husband of Mrs. Sutton?
A. Yes.
Q. You knew John S. Kenyon in his lifetime?
A. Yes.
Q. For how long a time previous to Mr. Kenyon's death had you been acquainted with him?
A. All his lifetime.
327 Q. Did you have business transactions with him?
A. Yes, sir.
Q. Please state what business transactions you had with him?

(Objected to by complainant's counsel as immaterial.)

A. Well, in various ways. In my younger days I lived with him some five or six years in a business capacity. He kept a hardware and harness store, &c., and I lived with him as clerk, &c., for four or five or six years; at the time I was about 21 or 22 years of age; subsequent to that I had more or less dealings with him, and of late years have attended to some of his private business when he has been away from New York; that is, in the capacity of real estate, &c., connected with my business.
Q. Your acquaintance with him has been close and intimate?
A. Very much so; as much so as brothers.
Q. You remember the circumstance of his death?
A. Yes; I was present at his death.
Q. And previous—during his four or five days' illness?
A. Yes; I was there more or less from the time he was taken sick, as soon as I was informed of it.
Q. Where did he reside?
A. At 308 East 124th street, in this city.
Q. Was that east of Second avenue?
A. That was east of Second avenue.
Q. Did you see him on the day that he was stricken down?
A. I did; he was in my office for an hour or more, I suppose, during the day.
Q. At what time of day?

A. He was there along about the middle of the day as near as I can recollect.

Q. How long did he remain?

328 A. He was there probably an hour or an hour and a half talking about various matters and business matters as well.

Q. I understand you he called and talked of business matters?

A. Yes; partially, and partially on other matters—his affairs, &c.; it was a general conversation as well as business.

Q. From your observation what was his condition of health at that time?

A. Perfectly good, as far as I could see. He talked so at all events.

Q. You say he resided at 308 East 124th street?

A. Yes; he owned a house there.

Q. Please state how he came to your office—whether attended or unattended?

A. He came there unattended—always did—and went away unattended, and I think he told me after he left my office that he was going to town.

(Complainant's counsel objects to the latter part of the answer, and moves to strike it out.)

Q. Please state whether you saw Mr. Kenyon frequently when in the city of New York, from the year 1872 or 1873 down to the time of his death?

A. Yes; I saw him frequently when he was in New York; part of the season he was away.

Q. Part of the time he resided in New York, and part of the time, as you understood, at Oconomowoc?

A. Yes, when he was here I saw him frequently. He was at my house and I at his house. as well as meeting casually.

Q. Where do you reside?

A. At 307 East 118th street. He used frequently to come down and take tea with me, &c.

Q. Did he come there attended or unattended?

A. Unattended.

Q. Please state any occasion when he came to your house or office attended; and, if so, by whom.

329 A. Well, I do not know that he ever came to my office, really, attended. He had been to my house with his sisters, or one of them, to make a call, or something like that, but never with any particular attendant.

Q. Please state, from your knowledge and observation of Mr. Kenyon during these times that you refer to as having seen him at your office and house, what his condition of health apparently was.

A. His condition of health was very good; as far as I could see or was aware of there was nothing the matter with him; he was like the rest of us, getting old, of course; but, as far as his health and mind and ability were concerned, he was as well as he had been for years, as far as I could see; I should judge so, because he was very

particular about his business and very minute in regard to it, even up to the day he was sick; that very day he was in my office to have certain insurance matters attended to, and he was very particular and was perfectly clear.

Q. When he was in New York state, if you know, what business, if any, he attended to of his own.

A. Well, I don't know that I knew of any particular business; he had private business of his own, of course, that I was not aware of—private matters; he attended to a portion of his own rents, and I attended to a portion of them, whether he was here or not; he attended to repairs, alterations, &c., when he was here, and he was perfectly capable of doing it.

Q. During those times that he was here, state if you met him on the street.

A. Yes; frequently; walked with him oftentimes a number of blocks when we were going up or down town.

Q. From where to where?

A. Sometimes we would meet at different points on Third avenue, on the street, and we would go as far as our business would
330 carry us—probably half a dozen blocks—often farther; we often met in that way on the street.

Q. Please state whether he was or was not attended during those times; and, if so, by whom.

A. Whether he had an attendant with him?

Q. Yes.

A. I never met him with any, unless it happened to be some one of his neighbors who happened to be talking to him on the street; I never met any attendant with him; he had a great many neighbors who might meet and converse with him on the street; I never saw any attendant with him.

Q. You have met him with Mrs. Sutton from time to time?

A. Yes; I have occasionally met him with Mrs. Sutton.

Q. When you state that he did not come to your office with an attendant and did not come to your house with an attendant, do you mean to be understood that he came there unattended by Mr. or Mrs. Sutton?

A. Mr. and Mrs. Sutton never came to my house with him, and I do not recollect of their coming to my office with him, but I have met Mrs. Sutton with him; I have met her in stores in town with him; have met her in Stewart's with him; I have met her in the streets with him, but she never came to my house with him, or to my office.

Q. You have stated that from time to time he would walk a number of blocks with you; please state if you recollect what effect, if any, this had upon him, apparently.

A. What, the walking?

Q. Yes.

A. Not anything more than it did on me; no effect at all that I could see or as far as I was aware of; he did not make any complaint to me.

Q. From your knowledge and observation of Mr. Kenyon during

the years previous to his death and up to the time of his death, please state what care and attention he apparently required.

331 (Objected to.)

A. I never knew that he required any particular attention.

Q. You have stated that your acquaintance with Mr. Kenyon was very intimate—like that of brothers?

A. Yes.

Q. Mr. Westover, a witness who has been examined on the part of the complainant, in his examination stated, among other things, the following, referring to John S. Kenyon, deceased: "He wanted more attention and care when near Mrs. Sutton in the little details of life than any man I ever saw." What can you state on that subject, not with regard to his presence with Mrs. Sutton, but generally?

A. I never saw that he required any particular attention, unless people wanted, and were very anxious, to bestow their attentions. As far as his requiring it, I did not see that it was necessary. When he was at my house I did not see that he required it, and when I was at his house I did not see that Mrs. Sutton waited upon him, or that he required any attention of that kind. He was at my house often to tea and dinner, and he never required any attention of that kind. He was always able to feed himself, to carve for himself, and everything of that kind, and he never wanted the attention of Mrs. Sutton or anybody else, without the attention was bestowed on him from courtesy, or something of that kind; he was always able to feed himself and attend to himself up to the day he was taken sick.

Q. Please state whether you did or did not consider Mr. Kenyon as strong and active a man as men of that age usually are.

A. Yes; I considered him so; he had always been well and healthy, and he had never had any particular fits of sickness, to my knowledge, while he was here in New York—never that we knew

332 of. He was healthy, and apparently as well as any man of that age.

Q. What doctor do you know ever attended to him in New York, if any?

A. During his last sickness?

Q. No; previous to that.

A. I don't know that he was sick enough to have any doctor. If he did, I think Dr. Brockway was his physician generally. I never knew that he was sick enough to have any physician, previous to his last sickness; that is, I do not know of my own knowledge, though he might have had, because I did not see him every day, of course.

Q. When you speak of Dr. Brockway, do you refer to Dr. A. Norton Brockway?

A. Yes.

Q. Residing in Harlem, on 126th street, near Madison avenue?

A. Yes; that is the physician, I think, that generally attended him, if he wanted a doctor, but I never knew that he was really sick enough to require a doctor until his last sickness, though he might possibly. He was generally very healthy and robust, a very good feeder, a good eater, and he liked what was good. At the time he

was living at Saratoga, when his wife's health was not good, I went up to see him. He was staying at the hotel; that was after the places were shut up; it was late in the season. He was then remarkably fleshy and stout. I think he was the only boarder in the hotel at the time, and one of the waiters came out, who knew I was a relative of his, and he said, "There is one of our boarders; see how slick and fat he is," remarking that he was well and in good health. And he was, remarkably so.

Q. You have stated here to-day that you are acquainted with Mr. and Mrs. Sutton?

A. Yes.

Q. How long have you been acquainted with them?

333 A. Well, I have known them quite a number of years; not intimately, but I have known them some 15 or 20 years, probably—15 years at all events; I have known them since Mr. Kenyon lived in 116th street; I don't recollect exactly how long ago that is.

Q. You knew them when Mr. Kenyon resided at 308 East 124th street?

A. Yes.

Q. Please state whether, subsequent to Mr. Kenyon's death, you had any conversation with them.

A. Yes, sir,

Q. How many?

A. I had two or three interviews with Mr. and Mrs. Sutton.

Q. Please state when and where you had the first interview.

A. The first interview was at Mr. Kenyon's house, where he died, 308 East 124th street; that was on the afternoon of the day he died; that was the first interview I had with them; it was in the front parlor.

Q. You three—Mr. and Mrs. Sutton and yourself—were in the parlor?

A. Mrs. Sutton was there most of the time and Mr. Kenyon's sisters were there most of the time—in the front parlor.

Q. Please state what was said in that conversation between yourself and Mrs. Sutton, or between yourself and Mr. Sutton when Mrs. Sutton was present.

A. Well, Mr. Sutton called my attention—Mrs. Sutton was present the same as these ladies are sitting here now—to the fact that Mr. Kenyon owned this property at Oconomowoc and was building a new house on it—he, as well as Mr. Kenyon's sisters, supposing that from my connection with Mr. Kenyon I might have charge of his property at his death. He went on to relate to me what had been done at the house—what they had been doing, what bills were paid, &c., since he returned in the fall, and stated that Mr. Kenyon was

334 building a very nice house for his own use on a farm which he bought some time previous; he was building the house in, I think, 1881, and he came home in the fall of 1881—November, 1881. Mr. Kenyon had been telling me about this house, but this conversation with Mr. Sutton was after Mr. Kenyon's death—the same afternoon. He wanted to relate to me how Mr. Kenyon's affairs were situated at Oconomowoc, in relation to the property

he owned at that place. He went on to state to me how much had been done, and what bills were paid and what bills were unpaid. I think he stated that there was a lumber bill of some six or seven hundred dollars unpaid, and that the man was not in a hurry, but the other bills were paid—some of them Mr. Kenyon had paid since his return to New York—a plumber's bill and a bill for lathing. He was very precise in stating these things, because he thought I would have charge of his affairs; and he then said he would give me any other information I required in relation to it, and stated that Mr. Kenyon anticipated taking a great deal of pleasure in his new house.

Q. You had a second conversation?

A. Yes.

Q. Where was that held?

A. At the same house; No. 308 East 124th street.

Q. Please state what was said at that interview between yourself and Mrs. Sutton, or between yourself and Mr. Sutton when Mrs. Sutton was present.

A. That was a subsequent conversation—probably ten days after the first conversation—two weeks possibly. I called on Mr. and Mrs. Sutton at the house of my cousin, deceased. They were in the dining-room; it was in the evening; nobody was there but Mr. and Mrs. Sutton and myself. The matter was referred to again by Mr. Sutton; we were all sitting together near the table. They re-referred to the house again and the work that had been done. I asked him what he thought was the best thing to do with it
335 and his advice was for the executors to sell the property. He said they would not want to finish it up, and he should advise a disposal of it—sell it to the best advantage they could; that would be his advice. I told him I thought that was the best way, too. I told him, of course, I had nothing to do with it, as it was ascertained then; but that nobody in the family would want it. Mrs. Sutton, of course, heard the conversation. She was sitting right there by me, and she acquiesced in the conversation; she thought so, as well.

Q. Was anything said at this time by Mr. Sutton in reference to a difficulty in obtaining mechanics; and, if so, what?

A. Yes; he stated that there was some difficulty in obtaining mechanics to do the work, and Mr. Kenyon did not want to be bothered with it, and Mr. Sutton said that he had volunteered to take charge of employing the mechanics and be there on the spot. Mr. Kenyon did not want to be there all the time attending to it, and Mr. Sutton volunteered to do it. Mr. Kenyon paid the bills and Mr. Sutton attended to it for him as superintendent; volunteered his services.

Q. What did Mr. Sutton at that time say, if anything, in reference to the house being built as a residence?

A. He said that Mr. Kenyon was building it for a residence for himself, for his own occupation, for a summer residence, as it were, because he had a house where he lived in the winter.

Q. What claim, if any, was made by Mrs. Sutton, or by Mr. Sut-

ton, in her behalf, at the time of these two conversations, on her part, to the property, as to her own ownership?

(Objected to generally.)

336 A. No claim whatever, and the thought was not mentioned at the time. As I have said before, they advised that it be disposed of; consequently they could not make any claim.

Q. Did you have any other conversation?

A. Not with them; no, sir.

Q. What was said at any time during these conversations, if anything, in reference to board, by Mrs. Sutton, or by Mr. Sutton in her presence?

A. The board of Mr. Kenyon?

Q. Yes.

A. At the last conversation in the dining-room, when we three were together, Mrs. Sutton stated that she had taken boarders, and that Mr. Kenyon boarded; and I asked her what she was going to do, and she said she was going to take boarders again when she went out to Wisconsin.

Q. In saying that Mr. Kenyon paid board, did she refer to Oconomowoc?

A. Yes; she said he paid board; that she had taken boarders, and would do so again.

Q. Did she state the amount of the board?

A. I think, if I recollect aright, she said $10 he paid a week.

Q. What other statement, if any, did Mr. and Mrs. Sutton make to you in regard to this property when they were together?

A. Well, I do not know that they made any other statement than what I have stated to you; and I had no subsequent meeting with them after this meeting in the dining-room of the house in the evening. That was the last interview I had with them.

Q. At that time, I understood you to say a moment ago, it was ascertained that you were not an executor named in the will?

A. At that time, yes.

Q. At the time of the last conversation?

A. Yes; but, of course, at the first one we had it was unknown who were the executors.

337 Cross-examination by Mr. WESTOVER:

Q. You expected to be an executor under the will of Mr. Kenyon, did you not?

A. I did not, sir.

Q. What do you mean when you say that you expected to have something to say about the settlement of the estate?

A. I did not say that I expected to.

Q. Did you not say in the direct examination that during this interview after Mr. Kenyon's death it was supposed that you would have the administration of the estate?

A. "It was supposed" so; not "I" supposed so.

Q. Who did suppose so?

A. His relatives.

Q. Then when you conversed with them, you did not suppose so—when you had this conversation with Mr. and Mrs. Sutton, you did not suppose that you would be concerned in the settlement of the estate?

A. The second—or the first—which?

Q. The first one.

A. At the first one it was unknown who would be.

Q. Did you not say that you conversed with them about that matter because it was supposed that you would be concerned in the settlement?

A. They supposed so.

Q. Did you suppose so?

A. No.

Q. Did Mr. and Mrs. Sutton suppose so?

A. Yes.

Q. Did they say so?

A. Yes.

Q. Did you tell them you did not suppose so?

A. No, sir.

Q. Did you not expect to be?

A. No, sir; I did not.

Q. Then why did you enter into this detailed conversation with them on the theory that you would have something to do with the settlement?

A. It was a voluntary matter.

338 Q. Why did you wish to enter into this detailed conversation with them?

A. I did not wish to; it was his own voluntary act.

Q. Then you did not say anything in this conversation that was not forced upon you?

A. I don't know that I did.

Q. And when you went the second time was that forced on you?

A. I went to make a call on them.

Q. Had you been in the habit of visiting Mrs. Sutton and Mr. Sutton?

A. No.

Q. Had they been in the habit of visiting you?

A. No.

Q. Then you went more frequently after Mr. Kenyon's death than before?

A. Only once, from courtesy.

Q. Then out of courtesy you asked them about this place in Oconomowoc?

A. No; they broached it themselves.

Q. Did they want you to buy the place?

A. No.

Q. Did they want to buy it?

A. I do not know.

Q. Did Mr. Sutton say anything to you about liking to buy the place?

A. No.

Q. He told you that Mr. Kenyon was building it for a residence?
A. Yes.
Q. Did he say who was to reside with him?
A. No.
Q. Did he tell you he was to reside in it alone?
A. He said that Mr. Kenyon was to reside in it; that was all.
Q. Did he show you the plans?
A. I don't think he did.
Q. Have you ever seen the plans?
A. Not that I know of.
Q. Have you ever been told the size of the house?
A. Mr. Kenyon told me, but I don't recollect now.
Q. Have you any recollection of the size of the house?
A. No.

339 Q. Did you understand Mr. and Mrs. Sutton that Mr. Kenyon was to conduct that place as a summer residence for himself?

A. I understood so, and that understanding was from Mr. Kenyon himself.

Q. Did you understand the size of the ground on which the house stood?
A. No.
Q. Do you know now?
A. Only from what Mr. Kenyon said he bought.
Q. What did Mr. and Mrs. Sutton together tell you was the condition of the house?
A. They told me the condition of the house as far as it progressed.
Q. Did they describe the house to you?
A. They described the manner in which it was built, and as far as it had progressed, the manner in which it had been done.
Q. Did they say anything to you about the plans?
A. No; they only said the house was inclosed, lathed, and shut up for the winter.
Q. Did they say anything to you about a barn on the place?
A. No.
Q. Did they say anything to you about a boat-house on the same place?
A. No, sir; not that I know of; I do not recollect it.
Q. Did they say anything to you as to the condition of the place, as to being graded?
A. Nothing.
Q. Did they say anything about the ornamental trees and shrubbery on the place?
A. They did not; but my cousin had told me of it previous to that.
Q. Did they say anything to you about a billiard-room in the house?
A. No.
Q. Did they say anything to you about the bed-rooms in the house?
A. No.

Q. Did they tell you how much it would cost to finish the house?
A. No.
Q. Or how much the place would sell for?
340 A. No; I did not ask it and it was not brought into conversation.
Q. Mrs. Sutton "acquiesced;" what language did she use when she acquiesced?
A. That she thought so too.
Q. "I think so?"
A. Yes.
Q. What other language did she use in that conversation?
A. I don't know that there was any other. I don't recollect any particular language.
Q. Was this conversation entirely between yourself and Mr. Sutton?
A. Yes, sir; entirely between Mr. Sutton and myself; only, Mrs. Sutton sat there and heard the conversation, of course.
Q. And she "acquiesced?"
A. She didn't say anything, except once, when she said: "I think so"—as far as that was concerned.
Q. As far as anything was concerned—I want the whole conversation.
A. I don't think she said anything particular, except that.
Q. To whom did you speak when you went into the house?
A. I spoke to both of them.
Q. What did Mrs. Sutton say?
A. "Good evening," I suppose.
Q. And what did you say to her?
A. The same, I suppose.
Q. What did she say next?
A. Nothing particular that I remember.
Q. Where did you sit?
A. In the dining-room.
Q. Where did you get the lively interest that you manifest in this case?
A. It was born in me, I suppose.
Q. In what room of that house was that conversation held?
A. The last conversation with Mr. Sutton?
Q. Yes.
A. In the dining-room of the house that Mr. Kenyon died in—the front basement, they call it.
341 Q. After you went there you entered into conversation with Mr. Sutton?
A. Yes.
Q. What did you go there for?
A. To call on them out of courtesy.
Q. What did you say when you went in?
A. "Good evening"—the same as any other gentleman would say.
Q. What did you say next?
A. I don't remember.
Q. Did you tell them what you came for?

A. That was unnecessary.
Q. Do you mean you went to make a call there?
A. Yes.
Q. Did they know why you were there?
A. No.
Q. And you did not tell them?
A. I did not tell them anything in particular.
Q. Who opened the subject of the house?
A. That I don't recollect.
Q. Who said anything about it first?
A. I do not recollect.
Q. How long had you talked with Mr. Sutton before Mrs. Sutton said anything?
A. I don't know as I can tell; I didn't take any particular minutes of the conversation.
Q. How long did you stay there?
A. Probably half an hour.
Q. Did you converse all that half hour?
A. Yes; we didn't sit there looking at each other.
Q. You looked when you talked to each other?
A. Yes; that was common politeness.
Q. Then you looked at each other, after all?
A. Yes; of course.
Q. But you were not silent?
A. No.
Q. Who did most of the talking, you or Mr. Sutton?
A. We both talked alike.
342 Q. Does he talk as fast as you?
A. I guess so.
Q. How about Mrs. Sutton?
A. I guess if you get her wound up pretty well, she can talk some.
Q. Was she wound up pretty well that night?
A. I don't know.
Q. She was wound up enough to say "I think so?"
A. Yes.
Q. And that was all she said?
A. Yes; that was all she said that amounted to anything. There might have been something else said that I do not remember now.
Q. That was all she said about the place or the house?
A. Yes; Mr. Kenyon had described to me the house, in a measure, but I cannot recall it now.
Q. And all she said about the future use of the house was to say "I think so?"
A. That was all. She did not say anything about the future use of it at all.
Q. You have given all Mrs. Sutton's conversation?
A. That was all she said to me that amounted to anything that I know of.
Q. That was on what day of the week?
A. I don't know that I can tell you what day of the week it was

that I was there, for I didn't make any minute of it, and I don't know that I have any recollection of the day of the week.

Q. It was after Mr. Kenyon's death?

A. Yes; probably ten days or two weeks after his death.

Q. And it was the second call that you had made at that house after his death?

A. Yes; after his death.

Q. The first call after his death was made when?

A. In the parlor the same afternoon that he died. I was not out of the house after he died when this conversation took place. It was on the day of the death, in the parlor, and subsequent to his death.

343 Q. Then this conversation to which you have testified as having taken place about ten days after his death was at the first time that you had been in the house since his death?

A. Yes; the only time.

Q. After that you didn't call at all?

A. No.

Q. How long did they stay in the house after that?

A. I don't know that I can tell exactly. I think they remained until March; I don't know that I can tell.

Q. You never knew Mr. Kenyon to be sick?

A. I never knew him to be sick enough but what he could help himself—that I know of.

Q. How sick is a man who is sick and yet can help himself?

A. I suppose he has got to be so bad that he has got to lie on his back, entirely helpless, in order not to help himself.

Q. Then, you have seen him sick, but not so sick as to be on his back; is that what you mean?

A. I can't say that I have.

Q. How sick have you seen him?

A. I have seen him a little unwell, the same as any other man would be at times.

Q. Did you ever see him have an attack of neuralgia?

A. No.

Q. Of the stomach?

A. No.

Q. Did you ever him complain of pains?

A. Well, yes. I might have. I have heard all men complain of pains.

Q. Who did you say was the doctor of Mr. Kenyon?

A. I think Dr. Brockway, if he had any.

Q. What did he have a doctor for?

A. I don't know that he did have any.

Q. Then why did you suppose that it was Dr. Brockway?

A. For the reason that he attended the family of his sister.

344 Q. Then you do not know that he ever had a doctor?

A. No; I don't know that he did.

Q. Then when you say that Dr. Brockway was his family physisian, if he had any, you are guessing at it?

A. I supposed that that might be the case; he attended his sister's family.

Q. You never heard Dr. Brockway say he attended him?
A. No; until his last sickness.
Q. Nor did you ever hear Mr. Kenyon say that Dr. Brockway attended him?
A. No; I don't know that he did until his last illness.
Q. You never heard that any physician attended him in New York except during his last illness?
A. I never did; and yet he might have had him for all that.
Q. You say that if he had one he would probably have Dr. Brockway?
A. Yes.
Q. And the reason you suppose so is that his sister had Dr. Brockway?
A. Yes.
Q. Were his sisters in the habit of being sick?
A. I don't know anything about it.
Q. Do you know whether they ever employed Dr. Brockway?
A. I don't know; that was none of my business.
Q. How do you know about Dr. Brockway?
A. I saw him at his house.
Q. Do you know whether they were sick?
A. No; I don't know.
Q. Do you ever visit them?
A. I do.
Q. Do you know whom Dr. Brockway visited professionally?
A. No.
Q. Then you do not know whether they ever did employ Dr. Brockway?
A. I do not know whether they did or not; but I know he was there at the house.
Q. But you do not know whether he was a visitor or not?
A. No.
345 Q. Then what you said about Dr. Brockway was all guess work?
A. Well, you can have it either way.
Q. Did you ever hear that Mr. Kenyon had an attack of apoplexy in 1878?
A. No.
Q. Or 1879?
A. No.
Q. Did he ever tell you that he had an attack of apoplexy?
A. No.
Q. Did you transact private business for Mr. Kenyon during his absence?
A. No.
Q. Who did?
A. I do not know, sir.
Q. You transacted a portion of it?
A. All I had to do with his business was collecting the rent of stores and houses that he had.
Q. What did you do with it?

A. Sent him the money.
Q. Where?
A. To Oconomowoc.
Q. To whom?
A. To him.
Q. To Mr. Kenyon?
A. Yes; of course. I would not send it to anybody else.
Q. How did you send it?
A. By check.
Q. How many summers did you act as agent to collect those rents?
A. Probably eight or ten years. I don't recollect exactly; I could tell if I was at home; I am only guessing at it now.
Q. Were you in the habit of sending the rent every year to him?
A. I did when he was not here in New York. When he was here he came and got it himself.
Q. How do you know that walking had no effect on Mr. Kenyon?
A. Because he did not make any complaint.
Q. Then you guess at that?
A. No; he made no complaint.
Q. Did you ask him if it had any effect?
A. No, sir. I had no reason to.
346 Q. Did you examine him after his walk to see if his pulse was different?
A. No. I had no occasion to examine him or his pulse.
Q. Do you know whether it excited any rush of blood to his brain?
A. No.
Q. Did you ever see him run?
A. Yes.
Q. Do you think he could run with impunity?
A. I think he could run as well as I can.
Q. Can you run pretty well?
A. You can try me if you want to.
Q. How far can you run?
A. I can run a number of blocks.
Q. Can you run half a mile?
A. Yes; I could if you did not run me too hard. I would not like to do it after dinner.
Q. Do you ever have any pressure on the brain when you do anything of that kind?
A. No, sir.
Q. You never had any neuralgia?
A. No.
Q. Then when you saw Mr. Kenyon walking, when it had no effect on him, you were not thinking whether it had any effect on him or not?
A. I had no right to think; he was walking along with me just like any other gentleman; and why should I ask him if it had any effect on him. He did not complain at all.
Q. The thought did not suggest itself to you?
A. It was not required. If the man didn't complain why should I ask him.

Q. He did not say anything about it?
A. Not at all.
Q. That is all you know—that you walked with him and he did not complain?
A. Yes, sir; a great many times.
Q. Do you know that he would have complained had he been in pain?
A. That I don't know anything about.
347 Q. Did you ever hear him complain of pain?
A. I may possibly have done so.
Q. I thought you said a while ago you never had?
A. Well, I don't know that I ever have.
Q. Then, you do not know that he would have complained if he had been in intense pain?
A. I do not know.
Q. Do you know whether he was a man that made much complaint or not?
A. He was a man that never made much complaint—no, sir.
Q. You say you never knew that he required any attention; did he tell you that he never required any attention?
A. No.
Q. Did he tell you he never was sick?
A. He never told me anything of the kind.
Q. Did he tell you he never was in pain?
A. Never that I know of.
Q. Do you know whether he ever was troubled with dyspepsia or not?
A. I do not.
Q. Do you know whether indiscreet eating was apt to make him indisposed?
A. That I do not know anything about.
Q. He has dined at your house?
A. Yes.
Q. Did he overeat?
A. I guess he never ate more than he wanted.
Q. Did you give him tempting food?
A. I did; I always eat well, myself, and like my friends to.
Q. How did he eat?
A. He ate well; satisfied himself.
Q. Did he ever complain of it?
A. No; I generally give my friends pretty good feed when they come to see me.
Q. You say he never wanted any attention, unless people were anxious to attend on him?
A. Yes.
348 Q. Do you know whether anybody was anxious to wait on him or attend on him?
A. I do not know.
Q. Do you know whether he was anxious for anybody to attend on him?
A. I do not know.

Q. Did you ever hear him express any desire for anybody to attend on him?

A. No.

Q. Do you think that to be slick and fat is an evidence of good health?

A. I should judge so; yes.

Q. Fat men, according to your construction, are healthy?

A. I should judge so.

Q. Fat men do not have apoplexy?

A. I do not know.

Q. Do you know what kind of people have apoplexy?

A. No; that is out of my line.

Q. Did you ever see a man have apoplexy?

A. No.

Q. Did you ever see a woman have apoplexy?

A. No.

Q. What was Mr. Kenyon doing when you saw him alone so many times in New York?

A. I didn't see him there; I saw him out where he lived—at Harlem.

Q. Well, I call that New York. What did you see him doing?

A. Attending to his affairs—attending to the repairs of his houses and stores, and to his own matters.

Q. You met him on the street?

A. Yes.

Q. Where was he generally?

A. Sometimes going up Third avenue, and sometimes down.

Q. By "up" you mean going north, and by "down" south?

A. Yes.

Q. He lived on 124th street, you say?

A. Yes.

Q. How far north is it on Third avenue before you reach the end of the avenue at the bridge?

A. About six blocks I should call that. The bridge is at 130th street.

349 Q. Did you state all the conversation as you recollect it which you had with Mr. Sutton at the house?

A. Yes.

Redirect examination by Mr. ERASTUS F. BROWN:

Q. You know Dr. Brockway as and old and intimate friend of the family?

A. Yes; I have known him since he was a young man.

Q. Do you know the fact that he was a frequent caller at Mr. Kenyon's sisters'?

A. Yes.

Q. Where have Mr. Kenyon's sisters resided for the last eight years.

A. At 307 East 124th street.

Q. Directly opposite Mr. John S. Kenyon's house?

A. Yes.

Q. Have you any pecuniary interest, directly or indirectly, in this controversy or in the result of it?

A. Not one penny, sir; in any shape or manner.

(By consent the signature of the witness is waived.)

CHARLES A. YOST, a witness called for the defendants, being duly sworn and examined, testifies as follows;

Direct examination by Mr. BROWN:

Q. Where do you reside?

A. At 52 East 124th street.

Q. What is your business?

A. I am in the clothing business.

Q. Where?

A. At the corner of Broadway and Broom street.

Q. Are you acquainted with the parties to this controversy—the executors of the estate of John S. Kenyon, deceased, defendants, and Mrs. Sarah S. Sutton, complainant?

A. I really do not know who the executors are. I am acquainted with Mrs. Sutton; that is, I have a casual acquaintance with her.

350 Q. And with Mr. Charles T. Sutton, her husband?

A. Yes.

Q. You are not acquainted with myself or Mr. Frank A. Kenyon, the executors?

A. No, sir.

Q. Did you know Mr. John S. Kenyon in his lifetime?

A. Yes.

Q. It has been put in evidence here that he was a member of the Presbyterian church of Harlem; is that the fact?

A. That is true.

Q. Are you connected with that church?

A. I am, sir.

Q. Are you an officer of that church?

A. I am an elder; the same board that Mr. Kenyon was a member of.

Q. Was Mr. Kenyon an elder also?

A. He was an elder and a trustee, both.

Q. How long were you associated together as elders of that church?

A. I cannot tell you exactly, but probably three years.

Q. How long had you been acquainted with Mr. Kenyon?

A. About ten years.

Q. Associated with him in that church?

A. Yes.

Q. Have you met him frequently while in New York?

A. Frequently, yes, sir; twice or three times, sometimes four times a week.

Q. Please state where.

A. I have met him at his house and in church. I have met him at prayer meetings. He has been to my house, and I have met him in the street. I have met him at my store, too.

Q. Did you meet him a short time previous to his death?

A. I think it was the day before; I am not positive, but it was within a day or two prior to his taking this last illness.

Q. Please state the facts and circumstances connected with that meeting.

351 A. He was at the prayer meeting on Wednesday evening, I think it was, and after meeting we went into the church.

Q. Please state how long you both were there that evening.

A. In the prayer meeting?

Q. At the church building?

A. In the church until probably 15 or 20 minutes past nine.

Q. Was he, there, attended or unattended?

A. Unattended; we were at the meeting until nine o'clock and then we went into the church, and were there perhaps 15 minutes. It was a rainy night, and he had an umbrella, and I had not—it had not rained when I left home, although it looked cloudy, but I live only around the corner from the church.

Q. Did he shield you from the rain with his umbrella?

A. Yes; and stood in front of my door perhaps ten or fifteen minutes before he went home.

Q. Engaged in conversation?

A. Yes, sir.

Q. Was he at the church that evening, throughout, unattended?

A. Yes, sir; at least I think he was.

Q. Did he leave you unattended when he left?

A. When he left me at my door I went upstairs, and he went home.

Q. Your acquaintance, I understand you to have said, had been intimate with him for some years?

A. Quite so. I looked upon him as one of my best friends in the church.

Q. What was his apparent condition as to health, physical and mental, that night?

A. As good as it has been at any time that I have known him.

Q. Was that good or bad?

A. Good, I think.

Q. You had seen Mr. Kenyon at church or at prayer meetings, or at the church edifice, a number of times previous to that?

A. Yes.

Q. During any of those times unattended?

A. Most of the time he was unattended, I think.

352 Q. Did he officiate in any capacity on the Sabbath, during church service—with a plate or otherwise?

A. He did.

Q. Please state how.

A. Took up a collection every Sabbath morning and evening when he was present; and he was present most of the time.

Q. Please state where the Presbyterian Church is situated.

A. Just west of the corner of Madison avenue and 125th street, in 125th street.

Q. How many avenues are there and what are the names of the

avenues between the Second avenue, east of which Mr. Kenyon resided, and Madison avenue, at which the church is located?

A. Mr. Kenyon resided just east of Second avenue: then there is Second, Third, Lexington, Fourth and Madison.

Q. These avenue blocks—please state whether they are longer than the street blocks.

Mr. WESTOVER: Let him state how long they are.

A. The ordinary street blocks are 200 feet, I think, and these avenue blocks are, I believe, two and a half times longer than the street blocks.

Q. Have you ever met Mr. Kenyon immediately upon his arriving at the church at these various times you have spoken of?

A. Yes.

Q. You have accompanied him from the church to his house?

A. No; I do not think I ever did that.

Q. Please state from where to where.

A. I have walked with him from the church to my house one or two evenings before he was taken sick; but I have gone with him to the corner of Third avenue frequently, just for a walk—on a pleasant evening.

Q. Please state what complaint you ever heard Mr. Kenyon make, if any, as to his condition of health.

A. I cannot say that he ever complained about his health.

353 Q. What was Mr. Kenyon's general appearance, as to being a healthy, hale man, or an indisposed or sick man?

(Objected to.)

A. He looked like a healthy man, to me, always.

Q. What did his action manifest?

(Objected to.)

A. A man in good sound health.

Q. You have been acquainted with him, you say, for about how many years?

A. For about ten years.

Q. During that period of ten years was there any period when Mr. Kenyon appeared to be broken down in health?

A. Not that I can remember.

Cross-examination by Mr. WESTOVER:

Q. What is the name of the church of which you are an officer?

A. The Harlem Presbyterian Church.

Q. Is the Harlem Presbyterian Church the church named in Mr. Kenyon's will as one of the legatees?

A. I do not know anything of that kind of my own personal knowledge, but I have been told so.

Q. Who told you so?

A. I do not recall now who did; I think our pastor told me; perhaps one of the officers.

Q. Did you ever read the will of Mr. Kenyon?

A. No, sir.

Q. Are you a member of the board of trustees?
A. No, sir.
Q. You are one of the elders?
A. Yes, sir.
Q. How many trustees has that church?
A. At the present time?
Q. Yes.
A. Four, I think; four acting trustees.
Q. You know them, do you not?
A. Yes, sir.
Q. Have you conversed with any of them about this matter?
A. No, sir.
354 Q. Only with the pastor?
A. I have not conversed about it at all, my dear sir; this was intimated to me.
Q. It was not a conversation?
A. No, sir.
Q. It was an intimation?
A. It was intimated to me that there was a clause in this will whereby the church would receive——
Q. How was it intimated?
A. That I cannot tell.
Q. Was it intimated by letter?
A. No.
Q. By telegraphic dispatch?
A. No, sir.
Q. By conversation?
A. I presume so.
Q. What was the conversation?
A. I cannot tell you.
Q. Who conversed with you?
A. As I said before, I think our pastor told me, and I do not know but what one or two of the officers told me.
Q. What do you mean by "officers told me?"
A. Trustees, I should say.
Q. Of the church?
A. Yes, sir; of the church.
Q. Do you know what part the trustees or officers of the church have taken in this litigation?
A. No, sir.
Q. Have you hear that they have taken any?
A. I heard it, I think, on Friday last.
Q. From whom did you hear it?
A. From this gentleman.
Q. From Mr. Brown?
A. Yes, sir.
Q. The executor.
A. I do not know whether he is an executor or not.
Q. Mr. Erastus F. Brown?
A. Yes, sir.
Q. He did not tell you he was an executor?

A. No, sir; he did not. I never met the gentlemen in my life before to my knowledge.

Q. How many elders are there in that church besides yourself?

A. At present there are five besides myself.

355 Q. Have you conversed with any of them about it?

A. Not a word, sir.

Q. The conversation then has been confined to Mr. Brown, the executor, the pastor of your church, and two of the trustees?

A. No; I did not say that at all.

Q. Well, what did you say?

A. Mr. Brown did not converse with me about his being an executor.

Q. No, you did not say that; but this conversation about the last will of Mr. Kenyon?

A. Well, he sent me a notice whether I could come down here. He was in the store yesterday, and he did not speak about it at all, but asked me if I knew Mr. Kenyon, and I said yes.

Q. Your conversation about the last will and testament of Mr. Kenyon, then, has been confined to the pastor of the church and not more than two of the trustees, and to those exclusively?

A. I don't know that I had a conversation with two of them; it is possible that I had; I don't know; I could not say.

Q. You know that you have had no conversation with anybody else whatever?

A. It was a matter that did not concern me at all, and I did not care anything about it.

Q. Do you know that you had no conversation with anybody else whatever than those?

A. I don't think I had any conversation with anybody whatever—I don't think I did. It was not at my solicitation, by any means.

Q. And if with two, those were whom?

A. Probably Mr. Ramsey, our pastor, and one of the trustees of the church—which one I could not tell.

Q. What night was this previous to Mr. Kenyon's death that you saw him at the prayer meeting?

A. I think it was on Wednesday night.

Q. The day before he was stricken?

A. Just what it was I could not say; if you can tell when

356 he was stricken that will tell the whole story.

Q. He was stricken on Thursday.

A. Then it was on Wednesday. I remember I said to my wife, "I am sorry I stayed at the door with Mr. Kenyon." I said to him at the time "It is raining, Mr. Kenyon, and"—

Q. Why were you sorry?

A. Because he was a friend of mine and I thought possibly it was indiscreet, our remaining on the street while it was raining; the street was damp.

Q. And you thought possibly he might have incurred some injury, and you felt badly?

A. Yes, sir; that is it exactly.

Q. Did you know Mr. and Mrs. Sutton?

A. Just casually, as I have said; I met her with him a few times coming to church, and I saw her at his house perhaps two or three times.

Q. Do you know what church she attended up in Harlem?

A. She attended ours occasionally I think; rarely; whether she attended any other I do not know.

Q. How often did she attend your church?

A. I could not tell exactly; not very often.

Q. You didn't know her very well?

A. Oh, I have met her in the church; Mr. Kenyon introduced me to her several years ago; and when she called of course, as an officer of the church, I would take her by the hand and give her a cordial greeting.

Q. Do you know Mr. Sutton?

A. I only saw him a few times.

Q. When you saw her at church who was with her?

A. She came with Mr. Kenyon.

Q. Was Mr. Sutton with her then?

A. No, sir; I don't know as I ever saw him at church.

Q. And Mr. Kenyon only was with her?

A. Mr. Kenyon only, when she came.

357 Q. You say that Mrs. Sutton did not come frequently to your church?

A. I don't think she did.

Q. Do you know where she went?

A. No, sir.

Q. Do you know whether she went at all?

A. To any other?

Q. Yes.

A. No; I don't know anything about that.

Q. Did Mr. Kenyon own or hire a pew in your church?

A. Yes; he did.

Q. Did he generally sit in that pew?

A. I think he did; but sometimes persons coming in a little late, if their seats are pretty well front, won't go far. I generally sit in my own pew.

Q. When Mrs. Sutton attended that church, did she also sit in that pew generally?

A. I think she did.

Q. You never saw Mr. Sutton?

A. I don't think I did. He may have been there; I won't say that he never was there, but I don't think I ever saw him there.

Q. Do you know whether Mrs. Sutton is a woman that attends church regularly or not?

A. No; I do not; I can't say. I don't want to be understood that she was there on very rare occasions; I won't say that, but she was not a regular attendant.

Q. Do you ever go to your pastor's house?

A. Occasionally; not very often.

Q. Did you ever meet Mr. Kenyon there?

A. I don't think I have.

Q. Did you ever meet Mrs. Sutton there?
A. No, sir.
Q. On the night before Mr. Kenyon was taken with his final sickness, you stood outdoors with him in the rain under his umbrella?
A. Yes, sir.
Q. You think he looked and appeared to be as well that night as you have ever seen him?
A. I think he did.

(By consent the signature of the witness is waived.)

358 ELISHA G. SELCHOW, a witness called on behalf of defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?
A. At 17 West 124th street, New York city.
Q. What is your business?
A. Manufacturer of games and home amusements.
Q. Where is your place of business?
A. 41 John street, New York city.
Q. Are you connected with the Harlem Presbyterian Church?
A. I am, sir.
Q. Are you an officer of that church?
A. Yes, sir.
Q. Please state what position you hold?
A. I am a trustee of the church.
Q. Did you know John S. Kenyon, deceased, in his lifetime?
A. I did; yes, sir.
Q. How long previous to his death?
A. I had known him for six or seven years.
Q. Up to the time of his death?
A. Yes, sir.
Q. Was he a member of the board of trustees?
A. Yes, sir.
Q. During how long a period?
A. During all the time that I was a member of the board of trustees—between four and five years.
Q. Did you see him frequently?
A. Yes, sir.
Q. Please state where.
A. I saw him at almost every meeting; in fact, every meeting, I think, that the board met, except the times when he was West.
Q. Please state where the meetings of the board were held.
A. They were generally held at Mr. Colwell's house or Mr. Edward Reid's house.
Q. Mr. William H. Colwell?
A. Yes.
Q. Now deceased?
A. Yes.
359 Q. Where was his house?

A. On the corner of 125th street and Lexington avenue.
Q. And where is Mr. Edward Reid's house?
A. On 129th street and Madison avenue.
Q. You have stated that he attended almost every meeting of the board?
A. Yes, sir.
Q. Did he attend alone or attended?
A. Alone.
Q. Please state whether he did or did not take part in the proceedings of the board.
A. He did; yes.
Q. To what extent, if any; an active part?
A. A very active part.
Q. Please state whether, at the close of those meetings, if you know, any one was present to accompany him away from the meeting?
A. To the best of my knowledge there was not.
Q. You never noticed any one?
A. No, sir.
Q. Have you ever met Mr. Kenyon on the street?
A. Yes; frequently.
Q. Conversed with him?
A. Yes, sir.
Q. Please state whether he was attended or unattended on the street when you saw him.
A. Unattended, generally, I think, when I have met him.
Q. Please state the apparent condition of Mr. Kenyon, physically and mentally, from your knowledge and observation.

(Objected to.)

A. I considered him a very healthy man.
Q. What did you notice when you saw Mr. Kenyon on the street; I refer to his manner, deportment, and apparent condition of health?
A. I thought he was an ordinarily healthy man. I had frequently walked with him from the church to Second avenue on Sundays.
Q. What unusual fatigue, if any, did he appear to suffer from the effects of such a walk?
A. I never noticed any.
360 Q. You were, of course, much Mr. Kenyon's junior?
A. Yes.
Q. Please state to what extent you slackened your general pace in walking with him.

(Objected to.)

A. I walked my ordinary walk with him.
Q. To what extent, if any, did walking your ordinary walk appear to affect him?
A. Not at all.
Q. Did Mr. Kenyon ever take part in the services of the sanctuary?
A. He did; yes, sir.

Q. Please state how.

A. He took up the collection and he has led meeting, and at our board meetings, when Mr. Mr. Colwell was absent, he took charge of the meeting.

Q. As chairman?

A. As chairman; yes, sir.

Q. Do you know anything in reference to a communion service at which Mr. Kenyon was present or officiated?

A. Any particular one?

Q. Shortly prior to his death.

A. I have no recollection of any particular one; none comes to my mind now.

Q. Please state whether he ever took part in the communion.

A. Yes.

Q. What part?

A. He passed the elements; the bread and wine.

Cross-examination by Mr. WESTOVER:

Q. Mr. Kenyon took an active part in the trustee board?

A. Yes, sir.

Q. What was required of him to do in order to take that active part?

A. Act as chairman.

Q. What did he do when he acted as chairman?

A. Conducted the affairs of the board.

Q. Sat in a chair?

A. Yes, sir.

Q. Presided over the meeting?

A. Yes, sir.

361 Q. Did he talk much?

A. Yes, sir.

Q. Did he talk more than the rest of the members?

A. No; I don't think so.

Q. All talked?

A. Yes, sir

Q. And he talked?

A. Yes.

Q. That is, the business of the meeting was to talk?

A. Yes, and to do whatever was necessary for the temporal affairs of the church.

Q. They did not do anything but talk, did they?

A. Yes; he voted; and put his hands in his pocket and helped the church.

Q. Gave money to the church?

A. Yes.

Q. He frequently gave money to the church, did he not?

A. Yes.

Q. That is the church that is mentioned in the will as one of the residuary legatees?

A. Yes, sir.

Q. Then, when you say he took an active part, you mean he pulled out his money at these meetings?

A. No, sir; he did not; it is not necessary for a man, in those meetings, to do that. We are simply providing for the affairs of the church.

Q. I do not want any reasoning; but simply want to know what active part he took in the affairs of the church. Did he put his hands in his pockets at these trustee meetings?

A. No.

Q. What did he do at these trustee meetings?

A. The business of the church.

Q. What business besides talking?

A. How do you mean? Why, regulating the renting the pews, and regulating the affairs of the church.

Q. How were they regulated? What did you do? When you say "regulate" what do you mean? Did you decide on something?

A. Decided on the rental of each one of the pews.

362 Q. And you talked over that—what you would decide?

A. Yes.

Q. And then your decision was orally agreed to?

A. Yes.

Q. Then your labor there was a labor of talking and thinking and consulting?

A. Yes—and acting.

Q. What was the acting?

A. The acting was the acting of putting down the number and price of the pews.

Q. The act of writing it down, you mean?

A. Yes.

Q. Who wrote it down?

A. Mr. Edward Reid.

Q. Mr. Kenyon did not do that?

A. No, sir

Q. He did talking?

A. He did talking, and conducting the meeting, the same as any chairman would a meeting.

Q. He sat there and listened to you talk, and he talked himself?

A. Yes; that is it exactly.

Q. Do you know that no one ever accompanied him home from these meetings?

A. Not that I know of. I never saw any one accompany him home from these meetings.

Q. Where did you go from these meeting?

A. I generally went home.

Q. And your home is 17 West 124th street?

A. It is now.

Q. Where was it then?

A. 222 East 126th street.

Q. To what year are you referring in your testimony or are you referring indefinitely to a number of years?

A. About Mr. Kenyon?

Q. Yes.
A. All the years that I was acquainted with him.
Q. How many years have you included in your testimony?
A. Six or seven years.
Q. Ending when—the time of his death?
A. Yes.
363 Q. And extending for six or seven years previously?
A. Yes.
Q. Did you know, during those years, whenever he was absent from the city?
A. Yes.
Q. How did you know it?
A. By his not being present at our meetings.
Q. And you judged when he was not at your meetings that he was not in the city?
A. Yes, sir; I have seen him at our meetings when the weather was very severe indeed.
Q. What do you mean by "ordinarily healthy"—the term you used?
A. Well, I should say that you were an ordinarily healthy man.
Q. And that Mr. Kenyon was an ordinarily healthy man?
A. Yes.
Q. That is to say, he apparently enjoyed the same health that you and I do?
A. Yes.
Q. You have not had a stroke of apoplexy?
A. No.
Q. Have you ever suffered much from neuralgia of the head?
A. Yes, sir.
Q. Have you ever suffered with congestion of the finer vesicles of the brain?
A. I do not know that I have.
Q. Have you ever suffered with dyspepsia?
A. Yes, sir.
Q. Have you ever suffered with dyspepsia of the stomach?
A. Yes.
Q. Have you ever suffered with dyspepsia of the larger intestine?
A. That I cannot say.
Q. Do you know whether he had neuralgia?
A. No; I do not.
Q. You judge that he was an ordinarily healthy man, then, from what reason?
A. From his being present at our meetings; and that, too, when younger men, I thought, would be absent, from the state of
364 the weather. He was very rarely absent from our church meetings, and prayer meetings and lectures—very rarely.
Q. And therefore you judged he was ordinarily healthy?
A. Yes, sir.
Q. You do not always judge of a person's health by the manner in which they attend church?
A. No, sir.

Q. You have known very strong, robustious members of the church that were rather dilatory in attendance?
A. I have; yes.
Q. Mr. Kenyon was not that sort of man?
A. No, sir.
Q. He was a man that generally attended church, if possible to get there?
A. Yes, sir.
Q. If he was not there, you always knew of a certainty that he was not in the city?
A. Yes.
Q. Did you ever hear him complain?
A. No, sir.
Q. He was not a complaining man?
A. No, sir.
Q. You have seen him walk?
A. Yes.
Q. And you have walked with him?
A. Yes.
Q. And you did not ask him anything about his health, and he did not make any complaint?
A. I have asked him the same as I would most gentlemen, "How do you do?" and he would say "Very well;" I never heard him complain.

(By consent the signature of the witness is waived.)

MARIA S. KENYON, a witness called on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. You are a sister of John S. Kenyon, deceased?
A. I am. I am his oldest sister.
Q. You reside at 307 East 124th street?
A. I do.
Q. And have resided there how many years?
A. Well, 12 years, I think we have been there.
365 Q. Mr. Kenyon, several years prior to his death, resided at 308 East 124th street?
A. Yes; for several years previous to his death he resided at 308, from 1879, I think. Previously to that time he resided part of the year at our house—after his wife's death, I mean.
Q. You saw him frequently during those years?
A. Whenever he was at home.
Q. Where did you see him?
A. At our own house and at his house.
Q. Did he spend any portion of his time, when in New York, at the house where you resided?
A. Before he went housekeeping in 308 he spent usually from—well, I don't know that I can mention the time, but he spent the winter with us.

Q. From how early a period did he spend the winter at 307 before going to his own house across the way?

A. From the death of his wife.

Q. Can you fix the year upon reflection?

A. Well, I should think from 1872.

Q. Down to 1879?

A. Yes.

Q. During the winter, since 1872, when he was in New York, I understand you to say, he resided at the house 307?

A. He resided with us.

Q. Was he, during that period, frequently from home, or did he reside there during the winter season?

A. During the winter season he resided with us.

Q. Did you see him often during that period; and if so, how often?

A. Why, daily—hourly, almost, except when he was out.

Q. Please state what Mr. Kenyon's condition of health was from your knowledge and observation during that period.

A. During that period, and during my brother's life, I never remember him to have employed a physician for any sickness of his own.

366 Q. State how he seemed to be affected, if at all, when at the house; and, if affected, for what length of time.

A. Well, he was subject to occasional headaches; we all are.

Q. Did these headaches, many times, prevent him from taking his usual meals?

A. Not at all that I know of; I have no recollection of his headache keeping him from the table.

Q. Do you know the fact of his going forth from the house and attending to business? If so, please state how actively.

A. Well, as actively as was necessary. He was in the habit of going out every day.

Q. Please state whether, on account of any condition of his health, his sisters attended him, or found it necessary to attend him in his going forth.

A. No; I do not think he would hardly have submitted to our going with him as attendants because of weakness.

Q. Did he go forth frequently, daily, alone?

A. Every day. I have no recollection of his being kept at home during any day.

Q. Did he stay away from the house any length of time during the day, when he went forth?

A. He would go after breakfast, attend to business, and return to dinner, take a nap after dinner, and then go out again after that.

Q. You regarded him, therefore, as an active man, did you, during that period?

A. Certainly; as active as myself—more so, indeed.

Q. To what extent did he require waiting upon and attendance during those years?

A. Well, my brother was not brought up to be waited upon and attended, usually. We none of us were.

Q. Please state what care was bestowed upon him, if any, during that period, by yourself, or by your sisters, to your knowledge.

A. Well, such care as sisters who loved their brother would naturally bestow upon him.

367 Q. State the general character of that.

A. We tried to make his room as pleasant as possible for him, and if he had a headache his head might be bathed—anything of that kind.

Q. Do you know of any times or occasions when he would call to be helped to a tumbler of water, or a coat, or anything?

A. No, sir; I do not remember any times when he would call for others to bring him water, or a coat, or anything of the kind.

Q. Please state to what extent, if at all, he was out during the evenings of that period.

A. He was out more or less every evening.

Q. Attended or unattended?

A. Unattended, as a general thing—sometimes inviting some one to go with him; if he went to a festival, or anything of that kind, inviting them, for the pleasure of the thing, to go with him.

Q. Were those social invitations or invitations for care and attention—do you know?

A. Social invitations.

Q. When he would go out in the evenings, as a general thing, would he be absent for a few minutes only or for longer periods?

A. Sometimes longer, sometimes shorter.

Q. What would you call a long period?

A. Well, I would call a long period 11 o'clock.

Q. Did Mr. Kenyon ever stay out until 11 o'clock to your knowledge?

A. I presume he has; I don't recollect particular times.

Q. During the time that Mr. Kenyon resided at 308 was he at any time present at your house, 307 East 124th street?

A. He was frequently over to dine, and usually on Christmas occasions, or Thanksgiving, or New Year's he was with us.

368 Q. How many times during the week, on an average, was he in the house?

A. Every day.

Q. How would he come in—by knocking at the door?

A. He would come in with his night-key; he would come upon us, usually, unexpectedly.

Q. During the period that he resided at 308 East 124th street, the last years of his life, what change, if any, did you notice in his condition of health—I mean physically or mentally?

A. He was well, as far as we observed, all the time; but he was not as strong the latter part of the last year as before.

Q. Do you remember the month of September, 1881?

A. I do, perfectly well; my niece was married on that occasion; my brother came from Oconomowoc in September alone, in very warm weather, and attended the wedding, and returned to Oconomowoc alone after the wedding was over.

Q. You saw him at the wedding?

A. I saw him at the wedding.

Q. To what extent did he take part in the festivities of that occasion, if at all?

A. The same as other guests.

Q. Was any apparent physical weakness caused apparently by the festivities of that day?

A. I do not think there was; I think he enjoyed them.

Q. Where did he remain during the period that he was in New York on that occasion in September, 1881?

A. He remained in his own house; we had a large company, and he opened his own house; he took his meals with us, but slept at night in his own house with several of our family.

Q. I understand you to say that, on account of the number of visitors at the house attending the wedding, he occupied his own house with a number of guests?

369 A. He did; two of my sisters, I think, certainly two of my cousins and a sister, slept over there with him; they all occupied the house and took their meals at our house during the time he remained after the wedding was over.

Q. Please state whether this was, if you know, because of weakness on the part of Mr. Kenyon or on account of the accommodation—this fact that your sisters slept at his house?

A. It was on account of the accommodation, and of course they did not wish him to sleep there alone. It was a very great accommodation to have the house opened when we had so many visitors, and it was a pleasure to be there with John.

Q. Did Mr. Kenyon return to Oconomowoc shortly after the wedding?

A. I am not sure how long he stayed—three or four days after the wedding. I am not quire sure as to the length of time.

Q. Do you know at what time he returned from Oconomowoc after that time?

A. He came on Thanksgiving morning of 1881.

Q. Please state how you are able to fix the date as Thanksgiving morning.

A. Well, as a general thing, he would come unexpectedly; he took pleasure in surprises. I think we were at breakfast when he came to the basement door. I know that it was Thanksgiving morning, but I cannot say why I know.

Q. Was he alone on that occasion?

A. He was alone when he came to our house on Thanksgiving morning, and he was alone when he came from Oconomowoc on the occasion of the wedding, and then he came with his large heavy satchel, bringing it himself.

Q. When was that—in September?

A. In September, the hottest season of the year.

Q. Please state, if you know, whether Mr. and Mrs. Sutton returned with him in November.

A. They did return with him.

370 Q. And please state, if you know, where they were on that morning.

A. Well, by observation, I cannot, but I believe that they were at Dr. Hills'. They spent the day, I believe, at Dr. Hills'.

Q. Near by?

A. Yes.

Q. Where did Mr. Kenyon dine on that Thanksgiving day?

A. Mr. Kenyon dined with us.

Q. And where did Mr. and Mrs. Sutton dine, if you know?

A. I am not so well informed with regard to Mr. and Mrs. Sutton; they did not dine with us.

Q. Were you present during Mr. Kenyon's last sickness?

A. I was.

Q. How soon after he was stricken down?

A. Immediately, before he lost consciousness; we went immediately over. Mrs. Sutton sent for us and we went immediately over—myself and my sister Elizabeth.

Q. Who were present, if you are able to state, from the time he was stricken down to the time of his death—four days?

A. Well, we were all there most of the time; at least my sister Elizabeth was there constantly, I think, and I was there except when I felt it necessary to rest.

Q. Mrs. Julia White you met there, did you?

A. I think she called once or twice; I do not remember seeing her in the sick room; I have no remembrance of her being there; I think she was in the parlor; I think I spoke to her in the parlor.

Q. Mrs. Julia White, on being examined yesterday, said that during this period Mrs. Sutton was Mr. Kenyon's nurse, and that his sisters did not render assistance, they being overcome with grief, and placing their heads in their hands. Please state what you know of these facts.

A. I remember nothing of the kind; we were there constantly; I was there with my brother until he became unconscious at
371 three o'clock on the morning of Friday. He was stricken on Thursday night, and I was with him until he became unconscious, and some time after, and then I felt that I must rest, and went upstairs to his room and rested and came back again, and he still, then, remained in a comatose state, and from that time until his death he was in that state, and we were there watching with him constantly. It was very little that we could do; nothing could be done for him except to wet his lips and lay a cloth upon his head, but those things were done by my sister Elizabeth, by Mrs. Sutton, and others of us.

Q. Did you have any conversation with Mr. Sutton or with Mrs. Sutton when Mr. Sutton was present, subsequent to the death of Mr. Kenyon?

A. Well, Mr. and Mrs. Sutton were present when the will was read.

Q. Please state the circumstances.

A. Well, I have very little to state; they were there and expressed disappointment at the terms of the will.

Q. Was anything there said in reference to the property at Oconomowoc; if so, what?—or as to Mr. Sutton's services?

(Objected to.)

A. I remember very well that there was some expression with regard to Mr. Sutton's services. I think he said that he had taken charge of the building there in September—probably when my brother came on to the wedding, because my brother was not strong at that time, and he felt that it worried him rather, and so he volunteered—offered to take charge of the building—and some expression was made with regard to whether he would be paid for his services, and of course we felt that whatever service had been rendered should be paid for, and we expressed ourselves in that way I rather imagine.

372 (Counsel for complainant moves to strike out this last answer.)

Cross-examination by Mr. WESTOVER:

Q. When was Mr. Kenyon "at home" according to the phrase as you have used it in your testimony?

A. He was at home during the winter season usually; sometimes he would come on in December, sometimes in November, and remain until May and June, and when he did not remain, I suppose, until June he would frequently come on again in July, to attend to business.

Q. Then, what you mean when you use the expression "at home" is that he was at home when he was in New York?

A. When in New York and at our house.

Q. And when not there he was away from home?

A. Yes.

Q. That is the way you use the expression?

A. Yes; when away from there he was usually out West.

Q. And his home during all these years was in New York?

A. We considered it so; he was born and brought up there.

Q. Is that the reason you speak of it as his home—because he was born and brought up there?

A. He was born and brought up there and had considerable property there.

Q. You merely use it, then, as a figurative expression?

A. I do not know what you mean by "figurative expression."

Q. To designate the place where his interests were.

A. To designate the place where his interests were, and to which he came and at which he remained most of his time.

Q. Most of his time?

A. The greater part of his time.

373 Q. Did Mr. Kenyon remain the greater part of his time in York, or in Oconomowoc, Wisconsin?

A. Well, I considered that he remained the greater part of his time in New York.

Q. Do you know when he went back and forth between Oconomowoc and New York?

A. He usually went back and forth—

Q. Do you know the dates?

A. No; I am not informed of that.

Q. Very well, you said he was at home here in the winter of 1872?

A. Mrs. Kenyon died in February, 1872.

Q. He went to Oconomowoc that same summer, did he not?

A. Well, I cannot be positive, but I think he did.

Q. Do you know whether he went to Oconomowoc in May, 1872?

A. No; I do not.

Q. Do you know whether he went to Oconomowoc in June, 1872?

A. I do not know the exact date of Mr. Kenyon's going to Oconomowoc.

Q. In 1872 I am speaking of.

A. In 1872 I am speaking of.

Q. He went there that year, did he not?

A. I presume he did.

Q. Do you know when, in the fall or winter of that year, he returned to your house?

A. No; I cannot go back so as to positively give the time. In the fall, I can say.

Q. Was it in the month of December?

A. I cannot say whether it was that year in the month of December. At times he returned to New York in December; sometimes in November, but usually in those years he was also here in July. He was secretary of the savings bank, and came back to make up interest and attend to the business there.

374 Q. Have you any means of knowing the exact amount of time that he spent in New York and the exact amount of time that he spent in Oconomowoc up to the time that he began to reside in 124th street?

A. I think there are means of knowing.

Q. Have you the means?

A. I have not.

Q. Can you tell when he left New York to go to Oconomowoc in the winter of 1872–3?

A. No; I cannot.

Q. Do you know whether he left previous to or after the month of February, 1873?

A. He would not be very likely to go in*to* February. I cannot say. I imagine that the climate of Oconomowoc is very severe in those months, and my brother, of course, would not subject himself to the severity of the climate there when he could return to New York.

Q. In February?

A. In February and March, and probably April.

Q. And for that reason you judge that probably he did not go so early?

A. Yes.

Q. Did not go so early as February, 1873?

A. No.

Q. You have no knowledge of the fact?

A. I do not positively know.

Q. Do you know how long, in the summer of 1873, he remained

in New York when he came here? Do you know the date of the month that he arrived and the date of the month that he left?

A. I do not.

Q. Do you know that he remained here in New York in the summer of 1873 to exceed five weeks?

A. No; I do not know that he did. Probably the business that he came on to attend to in the summer was finished by five weeks. I cannot be positive.

Q. Now, do you know that in the fall of 1873 he came to New York previous to the month of December?

A. No.

375 Q. Do you know when he went to Oconomowoc in the spring of 1874?

A. I do not.

Q. Do you know that he went to Oconomowoc in 1874, in the month of March?

A. I do not; I know that he went in the spring. With regard to the month and the date of the month I could inform myself, but I do not at present know.

Q. In the fall of 1874 do you know whether he arrived in New York previous to the 23d day of December?

A. I cannot give the dates.

Q. In the spring of 1875 do you know that he left New York on or about the fifth day of February?

A. I cannot give the dates, sir.

Q. Do you know that in the summer of 1875 he spent more than six weeks in New York?

A. I do not.

Q. Do you know that in the fall of 1875 he arrived in New York previous to the 1st day of December?

A. I do not. I cannot give the dates.

Q. Do you know, as to the spring of 1876, that you remained in New York later than the 10th day of February?

A. No.

Q. Do you know who left with him in the spring of 1876 for Oconomowoc, when he left New York?

A. I do not.

Q. Do you know, in the summer of 1876, that he was more than six weeks in New York?

A. I do not.

Q. Do you know how long he was in New York in the winter of 1876–7?

A. I cannot give the exact time. He was here during the winter season.

Q. Do you recollect—can you say—that he left New York for Oconomowoc previous to, or after, the 7th day of February, 1877?

A. I do not.

Q. Can you say that he was in New York more than six weeks in the summer of 1877?

A. I do not know.

376 Q. Do you recollect at what time in the fall of 1877 he returned to New York from Oconomowoc?

A. I cannot tell, sir.

Q. Do you know what time in the spring of 1878?

A. You wish me to to give the date, of course?

Q. I ask if you know the day, or something very near it—if you have any recollection of these different years, so that you can approximate the time. Do you know that he went to Oconomowoc previous to or before the 14th of February, 1878?

A. I presume it was after.

Q. Do you know? Have you any recollection?

A. I do not know in the sense of saying positively that it was after.

Q. Do you know whether he was in the city of New York at all during the summer of 1878, after he left here in the spring (whether it was in February or not); did he return?

A. I think he was not here in the summer of that year. He resigned his secretaryship in the bank and did not find it necessary to return in the heat of the summer to New York.

Q. You do not know that he was here, then, that summer?

A. I do not.

Q. Do you know that he came to New York in the following fall?

A. 1878; he did come in the fall.

Q. Was it on or about the 21st [of] December or the 4th [of] December, 1878?

A. I could not recall.

Q. Now, do you know when (why) he did not return to New York that summer?

A. Because he had resigned his secretaryship in the bank and he preferred to remain——

Q. You know that to be a fact?

A. I do not know it from his own mouth.

Q. How do you know it?

A. I got it from general observation and thought.

377 Q. How do you know why he preferred to remain in Oconomowoc that year?

A. Because he enjoyed the pleasure of the summer boarders there and the pleasure of the amusements there, and preferred probably remaining there to coming to New York in the heat of the season.

Q. He did not tell you why he preferred being there?

A. No; he did not tell me that.

Q. This is your supposition; that is to say, from the circumstances surrounding the case that would be your natural conclusion?

A. That would be my natural conclusion.

Q. That he did not want to come to New York without being obliged to.

A. Not at that season of the year.

Q. And business did not oblige him to come here?

A. Not at that season of the year.

Q. And therefore he did not come until business did compel him to, and he came in December, 1878, you say?

A. I could not be positive.

Q. In the summer or spring of 1878, when he remained from the time he went there in the spring until the next winter, in Oconomowoc, do you know anything of his having had an attack of apoplexy that year?

[A.] I do not think he had an attack of apoplexy there.

Q. You were not there?

A. No.

Q. And you do not believe he had any?

A. I don't think he had an attack of apoplexy. I think that he had a slight attack of paralysis.

Q. On what do you base your diagnosis of the disease that he had in Oconomowoc?

A. I base that idea on the fact of Mrs. Sutton having written to me at the time that my brother was not well.

Q. You are a sister of Mr. Kenyon?

A. Yes.

378 Q. He has always been tender of your feelings, has he not?

A. As far as I can remember.

Q. Do you think it would be more likely, if he had a difficulty of that kind, and was in danger of death, that he would be apt to aggravate your feelings by telling you of his disastrous condition, or that he would mollify it in his communications to you?

A. Well, I do not know that; he would probably state the truth.

Q. Was he regardless of your feelings?

A. Not at all, but he would probably state the truth.

Q. Well, Mrs. Sutton would not be so truthful, in your imagination, would she?

A. I have nothing to say about Mrs. Sutton.

Q. You can answer the question.

A. I do not know whether she would or not.

Q. She wrote you the letter?

A. Yes; that my brother was sick.

Q. Did you believe that?

A. I believed that he was, of course; I have no reason to disbelieve it.

Q. When did you first hear it said that Mr. Kenyon had had an attack of apoplexy?

A. I have heard it in this room that he had had an attack of apoplexy.

Q. Had you heard it before?

A. I do not think I have.

Q. The question was when you first heard it?

A. I do not know when, sir, I first heard it, but it strikes me that I have heard it in this room.

Q. For the first time?

A. It seems so, and yet I have an indistinct idea that from some one I heard that it was apoplexy, quite recently. I never before knew of its being apoplectic. I considered it paralytic; I supposed it was. It was numbness, I believe, on one side, from what was written to me, which would, of course, be paralysis.

379 Q. Did you, or not, hear of the disease of which Mr. Kenyon died?

A. Yes.

Q. What was that?

A. Apoplexy; supposed.

Q. You believe that?

A. Yes; I believe that, from what the physicians told.

Q. Now, if equally reputable physicians who attended him should say that the attack in Oconomowoc was apoplexy, would you believe that?

A. Why, of course I should believe it then.

Q. You have no knowledge of what the attack in Oconomowoc was except from the communications that were made to you by letter?

A. That is all.

Q. Did you ever talk to Mr. Kenyon about that?

A. I did not. I do not remember that I did. I cannot be positive. There might have been something said with regard to numbness or something of that kind. I presume it was a slight attack of paralysis.

Q. What is the difference between paralysis and apoplexy?

A. Well, if you wish to know what my view is, I can tell that; of course I am not a physician.

Q. It is only your view I want, because you have used the two terms?

A. Paralysis is an affection of the nerves, as I have understood it, while apoplexy is the breaking of a blood vessel on the brain.

Q. That is what you understand by it?

A. That is what I understand by apoplexy.

Q. Do you understand that apoplexy is necessarily a breaking of a blood vessel on the brain?

A. I have understood so, but I am not quite sure.

Q. Are you now referring to an attack of apoplexy that is fatal, or to an attack which sometimes passes?

A. Well, not being a physician, I won't venture any further in that line, sir.

380 Q. Have you ever seen any person in apoplexy except your brother?

A. Only my brother.

Q. Have you ever known of a person dying of apoplexy, before him?

A. I have heard of persons dying of apoplexy.

Q. Do you know that Mr Kenyon was in or about the city of New York in the year 1879?

A. I cannot remember.

Q. Do you remember in the fall of 1879 Mr. Kenyon and Mr. and Mrs. Sutton coming here from Oconomowoc?

A. I think that was the date of their commencing—of my brother's commencing—housekeeping at 308 East 124th street. Mr. and Mrs. Sutton came with him.

Q. They remained in that house during the winter, did they not, keeping house?

A. I think they did not go into the house until after the first of January.

Q. After they went in, I mean, they remained until they went West in the spring?

A. Yes; I presume they did.

Q. The next winter, did they keep house there also?

A. They did.

Q. And the winter in which he died?

A. Yes.

Q. Did I understand you, on your direct examination, to say that every day while he was in New York, and they were keeping house there, he went to your house?

A. Almost every day; it was very rarely that he omitted a day, and if he did we wondered what was the matter.

Q. Previous to their commencing to reside in the winter in that house, you say he made your house his home?

A. Yes; my sister's house—the house where we all live.

Q. At least while in New York?

A. Yes.

Q. He went out often?

A. Every day.

381 Q. And almost every evening?

A. Very frequently evenings.

Q. How much of his time was he out of that house that was his home?

A. I really cannot say.

Q. He was out every day?

A. I presume so.

Q. And almost every evening?

A. I think he was out very frequently evenings.

Q. And stayed out sometimes until 11 o'clock?

A. I cannot say positively with regard to that house, because I was not in the house—not cognizant of everything that occurred in the house.

Q. Where were you when you were not in the house?

A. You are speaking of the house where he lived, opposite, are you not?

Q. No; of your house.

A. Oh, I misunderstood you.

Q. Perhaps you misunderstood me all around. I will begin this point again. You testified that during the years previous to the time when Mr. Kenyon commenced to reside at 124th street in the winter, with Mr. and Mrs. Sutton, he spent the winters, when here, making the house where your home is his home?

A. Yes.

Q. That is your sister's house, is it?

A. Yes; my sister is the housekeeper.

Q. He made that his home?

A. Yes.

Q. You have testified that during those winters he went out frequently and every day?

A. Yes. I never knew of his being sick; I cannot remember any sickness of a day that prevented his going out. I do not remember any.

Q. And he went out almost every night?

A. Almost every evening. He went to church meetings; he went to a meeting of the library frequently; he went to the bank. Those were his resorts, as a general thing—church meetings and
382 meetings with the bank officers, and occasionally a library meeting. He was concerned with those different institutions.

Q. You have testified, as I have understood you—I do not wish to misstate you—that he was out until 11 o'clock. I presume that was your idea?

A. Yes; I will state that there were occasional festivals in the church and social business of different kinds, and on those errands he would be out until 11 o'clock.

Q. And was he alone on those occasions when he was out until 11 o'clock?

A. Except when he invited my sister to go with him; as I am not fond of going to these places he usually invited her to go.

Q. He usually did?

A. Sometimes he would and sometimes he would not.

Q. Did he generally invite some one to go with him?

A. I cannot say what he generally did—whether he generally did or not.

Q. Do you know that when he did invite some one the invitation was declined, and he generally went alone?

A. As a general thing, I suppose, if any one was invited they would go.

Q. I am not asking for a supposition, but the fact; did they go when invited, or did they let him go alone?

A. Sometimes they went when invited.

Q. Did they ever decline to go with him at night?

A. I cannot say.

Q. How often was he permitted to go out at night after the year
1877 alone?

A. I am sure I could not tell you, sir.

Q. Often?

A. Why, he went whenever he chose alone.

Q. How often did he choose to go alone?

A. That is more that I can tell.

383 Q. Did he generally prefer to go alone when he went from your house?

A. Do you mean on festive occasions?

Q. I mean on any occasion when he went out at night?

A. He never asked asked any questions—whether anybody would go with him or not. We are perfectly free at our house and nobody interfered with him. He was perfectly free to go, and able to go, and enjoyed going.

Q. And he went?

A. He went when he chose.

Q. You say that during those times he had more or less headache?

A. He had occasional headaches; the only sickness that he had physically was occasional headaches.

Q. And you said in your direct examination "the same as we all have," did you not?

A. The same as we all have.

Q. What do you mean by that expression?

A I mean that I am subject to headaches. I had a headache this morning.

Q. Is your sister subject to it?

A. Sometimes.

Q. All of you?

A. I guess we are all sometimes subject to them. Are you not, sir?

Q. Well, I am not under examination. Have you any brothers?

A. I have one brother.

Q. Does he have them, too?

A. He is out West; I do not know.

Q. What kind of headaches did Mr. Kenyon have, according to his complaint?

A. I am sure I do not know what sort of headaches you would call them.

Q. I asked what you would call them?

A. I am not perfectly able to define the cause of headaches.

Q. I did not ask you the cause, but the kind.

A. I do not know how many kinds there are, so that it would be impossible to classify them.

384 Q. You know the kind you have yourself?

A. I know the kind I have when I am tired and vexed. I think likely sometimes he had those. There are some headaches that come from extra exertion, and there are some that proceed from eating.

Q. Did he ever have those at your house?

A. I presume he had; he ate heartily.

Q. Did he complain of any inconvenience from having overeaten at your house?

A. I do not think he did.

Q. Did you ever know him to suffer any inconvenience from having overeaten?

A. Really I do not think I did.

Q. What caused those headaches from which he suffered at your house?

A. I cannot say.

Q. Did you ever see him vexed?

A. He was of a very equable disposition, which means not subject to extra excitements—a very quiet man.

Q. You did not see him vexed—you never have seen him vexed?

A. Well, I do not know what your idea of vexed is.

Q. Well, I want your idea—what is your idea of vexed?

A. I suppose he was liable, like the rest of us, to be vexed.
Q. The rest of your family, do you mean, or the rest of the human family?
A. We are all liable to be vexed—the family, if you please.
Q. Are you vexed now over this lawsuit?
A. I presume I am, sir.
Q. Does it make your head ache?
A. I presume it has done so.
Q. Did he have headaches from vexation?
A. I do not know; I suppose he did.
Q. At what time of day did he have such headaches?
385 A. I do not know that he had them at any particular time of day.
Q. Did he have them so severely that he would not walk out?
A. Well, he preferred to be quiet when he had them.
Q. Did he generally keep quiet on such occasions?
A. Yes.
Q. Did he complain of the heat affecting him?
A. I do not know that he did.
Q. You say that he never employed a physician?
A. Never to my recollection.
Q. While he was at your house, he had no need of a physician as far as you know?
A. As far as I know.
Q. Do you know where he went when he was at your house and used to go away in the daytime?
A. I did not ask him where he went.
Q. Did he tell you without your asking?
A. Not very often.
Q. Occasionally, would you know where he had been?
A. Occasionally, he would tell us where he had been.
Q. Did he ever tell you about going over to Brooklyn?
A. Yes; he would mention that he had been to Brooklyn.
Q. He would sometimes mention that?
A. Yes.
Q. Sometimes he would tell you he had been to church?
A. Yes.
Q. Did any of you go to church with him?
A. We attended a different church.
Q. Not with him?
A. Not with him. We would sometimes go with him, but we attended a different church.
Q. You say that such attention was bestowed upon him by you and your sisters as is customary among sisters towards a brother for whom they have an affection. Will you please tell me what sort of attentions these are?
386 A. The attention that he needed. I can scarcely tell what the attentions are that you would give to one that you cared for, in your own house.
Q. You meant something by the remark that you gave him such attentions as sisters would give to a brother?

A. If he wanted anything attended to, we were ready to do it. If he wanted his clothes attended to, we did it.

Q. You did do it?

A. Yes.

Q. Any other?

A. If he was sick, some one of us would bathe his head—I mean to say with regard to his headache—if he had a headache some one would bathe his head. And everything for his comfort was attended to.

Q. Little things that servants would overlook or not understand?

A. Little things that would be necessary.

Q. Things that sisters only would do?

A. Little things that sisters only could or would do.

Q. You were not anyways unwilling to bestow those attentions?

A. I think not.

Q. And you were not at all niggardly in the bestowal of them?

A. I do not know what you mean by that.

Q. Sparing—reluctant?

A. No; none of us were reluctant.

Q. And you frequently offered your services as sisters in the little things of life every day?

A. Of course we were there ready to do every and anything that was wanted.

Q. And you did that every day?

A. Every day, if he wished it.

Q. In September, 1881, one of your nieces was married, and Mr. Kenyon attended the wedding?

A. Yes.

Q. To attend that wedding he came from Oconomowoc?

A. Yes.

387 Q. And that wedding was held where?

A. In our house at 307 East 124th street.

Q. You have stated that Mr. Kenyon came to New York on that occasion from Oconomowoc alone.

A. He did.

Q. How do you know that he came from Oconomowoc to New York city alone?

A. There was no one with him when he came to the house; besides that we had a telegram from him, I think from Rochester, stating that he would be at our house at such an hour, half-past ten in the evening, and of course waited for him; he was very late getting in.

Q. And he arrived at your house alone?

A. He did,

Q. At what time in the evening?

A. He was detained. I think it was between 11 and 12 that he came to our house.

Q. Do you know that he had no travelling companion from either Oconomowoc or Chicago?

A. I never heard tell of any.

Q. Did you ask him if he had a travelling companion?

A. I do not think I did. I did not imagine he had.

Q. No, but your imagination is not particularly what I was asking for. Did you hear him say that he had no travelling companion on that journey?

A. I do not remember hearing him say anything about it; we took it for granted that he came alone.

Q. You knew from your information that Mrs. Sutton did not come with him—that she remained in Oconomowoc?

A. I did not imagine that she came with him; I did not suppose she did.

Q. You do not form all your conclusions from imagination, I suppose?

A. We form many conclusions from imagination.

388 Q. Are many of the conclusions you have given to-day from imagination also?

A. I have endeavored to speak the truth, sir.

Q. Doubtless you speak the truth, but your conclusions are largely from your imagination it seems; you have given many conclusions without undertaking to know the fact.

The WITNESS: May I ask you a question, sir?

Mr. WESTOVER: You may.

The WITNESS: Did Mrs. Sutton go with him?

Mr. WESTOVER: I do not think she did.

The WITNESS: Nor I.

Q. I did not ask you if she came with him. I ask you do you know that she did not come with him from that information?

A. No; I did not know it from information until I got it from you. I did not suppose she would leave her husband, a man in ill health, and come on here with her house full in the summer.

Q. So that if you were to testify that she did not come it would be from your supposition again?

A. Well, it would not be from my having been on the car and seeing that she did not.

Q. It would be from your having supposed that she would not come?

A. I would not suppose she would come.

Q. But you have no information as to whether she came or as to whether anybody came with him except what I have just given to you; is that what you mean?

A. No; I do not remember John's expressing himself.

Q. Do you know how long he was gone from Oconomowoc on that occasion?

A. I think he arrived in New York on the 6th of September, and remained here some days after the wedding; the date of the day on which he returned I do not know.

389 Q. He was here three or four days, more or less?

A. I guess he was here more than that.

Q. Four or five days, more or less?

A. Probably a week or more.

Q. He might have been gone two weeks from Oconomowoc?

A. Yes; he might.

Q. Do you know why Mr. Kenyon changed his home from your house to 308 East 124th street in the fall and winter of 1879–'80?

A. I do not, except that we did not have sufficient accommodations; we were rather contracted in our accommodations. He never said why—if you wish me to give what I know, he never said why; yes, I remember his saying that he thought he would be more happy keeping house.

Q. You say your accommodations were becoming rather contracted?

A. They were rather contracted.

Q. You had not intimated to him that they were?

A. Oh, no; we never said to him, but he could know that there were some little changes that we were obliged to make.

Q. He was still welcome to make his home at your house?

A. Oh, yes.

Q. And neither you nor your sister intimated to him that the accommodations were rather contracted?

A. No; not at all.

Q. You did not invite him to make that change?

A. Not at all.

Q. It was his own free act, from reasons of his own?

A. From reasons of his own, I suppose.

Redirect examination by Mr. ERASTUS F. BROWN:

Q. (Showing a paper to witness.) Please look at this paper and state whether you have seen it previous to to-day?

A. This is my brother John's handwriting; this, I think,
390 is a paper found among his books and papers at 308 after his death.

Q. Found by you and delivered to one of his executors?

A. I believe so.

Q. Please look at the whole of it and state whether it is in Mr. Kenyon's handwriting?

A. It is in my brother's handwriting.

The said paper is offered in evidence by defendants' counsel.
It is objected to by complainant's counsel as incompetent.
It is marked Exhibit 1, June 1, 1883. It reads as follows:

(Page 1.)

"Assets, Jan'y 1, 1882:

7,000 South Carolina bonds.

Premium:

6,000	Newton bonds	20	7%	1,200
2,000	Long Island city bonds	10 " do.	7 "	200
3,000	Dry Dock, E. B. and Battery R. R.		7 "	
1,000	E. A. Reid's note		6 "	
500	M. S. Kenyon "		7 "	

6,000	D. Hotaling, B. & M.		6 "	
5,000	E. A. Reid, "		6 "	
2,450	W. Parsons, Rochester		6 "	
7,000	Thos. Ebert.			
6,000	Adams Express Co. stock	½	150 "	
			8 "	3,000
5,000	D. D., E. B. and Battery R.R.	¼	8 "	2,500
5,000	Wells, Fargo & Co. Express	½	8 "	2,500
4,000	Harlem Gaslight Co.			
250	Harlem & New York Navigation Co.			
100	Harlem Library.			
30,000	3d avenue & 126 street.			
30,000	" No. 224 & 226.			
391				
15,000	avenue A & 116 street.			
11,000	No. 308 East 124th street.			
4,000	Second avenue, 118 & 119 street.			
150,300"				

(Page 2.)

"Assets continued.

$2,000	Madison avenue, Central Morrisania.	
4,000	House at Oconomowoc.	
7,133	" "	
76	Cash on hand.	
4,842	" in Harlem Savings Bank.	
168,300		
	Furniture in house 308 124th street.	
	" with Frank A. Kenyon.	
8,000	Premium on Adams & Wells, Fargo & Co.	
1,400	" on Newton & L. I. City.	
150,300		
13,133		
4,918		
9,400"		

Counsel for defendants also offers in evidence from the said paper marked Exhibit 1, June 1, 1883, the following:

The statement at the head of the paper reading "Assets, Jan'y 1, 1882," and the following:

4,000	House at Oconomowoc.	
7,133	" "	

392 Q. You have spoken of Mr. Kenyon going back and forth in his lifetime to and from Oconomowoc; let me ask whether that was his general habit during his lifetime?

A. It was.

(By consent the signature of the witness is waived.)

MARY JANE STEED, a witness called on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. You were formerly Mary Jane Wiswell?
A. Yes.
Q. Please state where you reside.
A. 1139 Washington avenue, New York city.
Q. Do you know the parties to this controversy—the executors of John S. Kenyon, deceased, and Mrs. Sarah S. Sutton?
A. Yes; I am acquainted with them.
Q. Did you know Mr. John S. Kenyon in his lifetime?
A. Yes; I was quite well acquainted with him.
Q. How long did you know him?
A. I knew him from September, 1871 up, almost, to his death.
Q. Please state how your acquaintance began, if you are able.
A. I was engaged to go to his house to be a general housekeeper there.
Q. Where was that?
A. He lived in Tremont.
Q. His wife was then alive?
A. Yes; his wife was then alive.
Q. Did you see Mr. and Mrs. Sutton at that time?
A. Yes; they were both there.
Q. Please state, if you know, who took charge of and attended to the necessities of Mrs. Kenyon.
A. Mr. Kenyon took charge of her.
Q. What offices did he render?
A. Well, he took charge of her altogether in her sickness. He was the only nurse she had.

393 Q. How long did you reside there?
A. Eight months.

Q. How long did Mr. Kenyon, during that period, care for her?
A. Up until she died.
Q. Have you known Mr. Kenyon since that time; and, if so, how lately?
A. I often have seen him at the Harlem Bank and other places; have met him on the street, and have seen him pass my house.
Q. You have met him at the Harlem Bank?
A. Yes.
Q. How often?
A. About twice a year.
Q. Did you converse with him?
A. Yes.
Q. Please state, if you know, what his apparent condition of health then was as compared with his condition of health at the time he waited upon his wife in earlier years.

(Objected to.)

A. When I saw him after I left his house do you mean?
Q. At the bank?

A. Well, I thought his health was looking better than when I lived with them; I said so to him, too.

Q. Was he pleasant and affable?

A. Oh, yes; very.

Q. What did he complain of there, if anything?

A. He didn't complain of anything.

Q. You were well acquainted with him and spoke to him?

A. Oh, yes; and he shook hands with me.

Q. You said that from the time that you were with Mr. Kenyon in the house at Tremont, down to a late period, you saw him about twice a year?

A. About that. I would not say certain.

Q. Down to how late a period?

A. Down to about 18 months before his death. He was in the bank then.

Q. What were his manner and appearance then?

394 A. He looked well; I told him I thought he was renewing his age, he looked so well.

Q. His appearance struck you so forcibly?

A. Yes; he always looked well. He always joked a little with me, and I did with him. He looked well.

Cross-examination by Mr. WESTOVER:

Q. Where did Mrs. Kenyon die?

A. In Tremont.

Q. Where is that?

A. It was in this city, only it was called Tremont before it was connected with the city.

Q. Were you there much of the time?

A. Yes, sir.

Q. Where did you ever see Mrs. Sutton to become acquainted with her?

A. At Mrs. Kenyon's.

Q. When did you see her there?

A. On the first day I went there.

Q. When was that?

A. On the first day of September, 1871.

Q. When did Mrs. Kenyon die?

A. In 1872, in February.

Q. She lived two months after you went there, you mean?

A. No; I went there the first day of September, and she died in February of the next year.

Q. Was that the first time you had ever been to Mr. Kenyon's house?

A. No; I had been there and engaged to go.

Q. Just previous?

A. Yes; about a week before.

Q. Were you ever at his house when he lived in Harlem, before he moved to Tremont?

A. No.

Q. Had you ever seen Mrs. Sutton before you went to Mr Kenyon's house the first day you went there?

A. No; never saw or heard of her before.

395 Q. Do you know how long she had been there when you saw her then?

A. She was there as a guest through the summer.

Q. Had been the summer previous?

A. Yes; had been there that summer.

Q. The summer which was past?

A. Yes.

Q. That you knew?

A. She said she had been there quite a while.

Q. Did she say she had been there as a guest that summer?

A. She didn't say as a guest, but she was considered as a guest, and we treated her as a guest.

Q. How long did she stay as a guest?

A. I think until about the time the croquet parties closed.

Q. How long did she stay away?

A. About six weeks.

Q. About when did she go?

A. When the weather [be]came cold.

Q. About what month?

A. About the time when the weather comes in cold.

Q. About the first of November?

A. I think it was in November; I am not certain; about when things looked a little dreary outdoors.

Q. She stayed away about six weeks?

A. Well, I can't say exactly, but I thought she was a good while away.

Q. How long did she stay then?

A. One night, and then went away.

Q. Then how long did she stay away?

A. She stayed away until Mrs. Kenyon became so sick that she came up to see how she was getting along.

Q. How long was that—a month?

A. I couldn't say.

Q. Two months?

A. Oh, no; Mrs. Kenyon died in February. We felt anxious about here, and I suppose she heard she was sick, and came up to see how she was.

396 Q. You say that after the croquet season closed she went away for about six weeks and then went back and stayed one night, and then went away again and stayed until a few weeks before Mrs. Kenyon's death?

A. Well, she was there a few days anyway before she died.

Q. Perhaps not more than three or four days?

A. I could not tell exactly.

Q. Perhaps two?

A. I could not tell exactly, because I was not keeping any account; but she was there a while.

Q. She was there a while before Mrs. Kenyon died?

A. Yes.
Q. How long was it that she was there before she died?
A. That was the last time.
Q. How long before Mrs. Kenyon died did she arrive?
A. She seemed to be there several days, but I could not say. It was not my business to look after her; but I saw her there and saw that she was interested about Mrs. Kenyon being so sick.
Q. What was she doing?
A. She went back and forth, and would come in and sit with us awhile, and go in and see how Mrs. Kenyon was getting along. She didn't do anything.
Q. You did not act as Mrs. Kenyon's nurse?
A. No; never. Never put my hands on her in my life as nurse. No one ever did but Mr. Kenyon, as far as I could see.
Q. Were you in the room when Mr. Kenyon nursed her?
A. Sometimes.
Q. What were your duties as housekeeeper?
A. You know what a housekeeper's duties are.
Q. Well, I am asking you.
A. The same as any other lady that has charge of a house and the care of everything.
Q. Did you have anything to do with Mrs. Kenyon?
397 A. Only to keep her room; never put my hand on her as nurse or anything of that kind.
Q. How much of the time would you spend in her room?
A. Not much.
Q. What would you go in there for?
A. I would go in and ask about her and what she would have for breakfast; if there was anything I could do for her I would go in.
Q. Did you have much conversation with her?
A. Yes, a good deal.
Q. Alone?
A. Yes.
Q. When Mr. Kenyon was not there?
A. Yes.
Q. A good deal?
A. Not a good deal, but I would go in to see what she would want.
Q. Did you wait until some one came to relieve you?
A. Oh, no; I was not kept there at all.
Q. You were not required to stay?
A. No; only as long as I chose.
Q. What floor was that?
A. The front parlor was the sick room.
Q. Where was the kitchen?
A. The kitchen was in the basement and the dining-room was over that.
Q. You say that Mrs. Sutton was a guest there?
A. Well, she acted like a guest; occupied the guests' chamber—her and her husband—and didn't seem to have anything to do, only to read and do a little fancy work.

Q. You are speaking about the summer before you went there?
A. When I was there; I don't know what she did before I went there.
Q. Then, you are talking about the time you were there?
A. Yes.
Q. Up until the time when croquet closed?
A. Yes.
Q. Was she out playing croquet most of the time?
398 A. No; of fine days Mr. Kenyon would go out, and they would all play.
Q. Did they play every day?
A. Well, not every day; some days it would rain.
Q. They played every day that it didn't rain.
A. Well, I wouldn't say every day.
Q. Then, when the croquet season closed she departed?
A. When things began to look dreary, and it was not pleasant out, she went home.
Q. Were you ever at Mrs. Sutton's house?
A. No.
Q. Do you know where she went when she left?
A. She boarded at her mother's.
Q. You know that?
A. I heard her say that.
Q. There is where she went when she left Mr. Kenyon's?
A. Yes, she said she was going there.
Q. You say you took her to be a guest?
A. Yes.
Q. Because she was occupying the guests' chamber, and because she was doing fancy work and played croquet?
A. Yes; I never saw that she had any business there at all.
Q. You never saw her in Mrs. Kenyon's room?
A. Oh, yes; she would be there often, and I have been there—
Q. What would she do there?
A. She would read to her—they were friends.
Q. Who were friends?
A. Mrs. Kenyon and Mrs. Sutton.
Q. Whom did you hear say so?
A. I heard Mrs. Sutton say they were girls together.
Q. Did Mrs. Kenyon say anything to you about that?
A. I do not remember.
Q. You did not hear her say anything about it at all, did you?
399 A. I would not say whether I did or not, but I heard her say they were old acquaintances.
Q. Did she read much to Mrs. Kenyon?
A. I have seen her read several times to her.
Q. Is that another evidence of being a guest; do guests generally do that?
A. Well, I don't see why she would not; she would want to amuse her a little, I should think.
Q. Especially if they were old friends?

A. Yes.
Q. Who read to Mrs. Kenyon after she left?
A. Mr. Kenyon, I suppose.
Q. I do not want your supposition.
A. Well, you ask me, and I didn't do it; I had something else to do.
Q. Then you do not know?
A. No.
Q. You do not know who read to her?
A. I do not know that anybody did, for she began to feel poorly when the cold weather began.
Q. You were in the house from September to February?
A. I was eight months in the house, and left there on the first of May, when Mr. Kenyon sold his house.
Q. Who was in the house then?
A. Mr. Kenyon.
Q. And you?
A. There was somebody else, too; there was two ladies.
Q. Yon would not be afraid of Mr. Kenyon?
A. Oh, no; he was a gentleman.
Q. Who else was there?
A. Mrs. Kenyon's two sisters were there; they came on to the funeral; at least one of them came from Rochester.
Q. And then they tarried there afterwards?
A. Yes.
Q. Did Mrs. Sutton also tarry there?
A. No; she went away after the funeral.
Q. Right after?
A. Yes.
400 Q. Where did she go then?
A. She went to her home.
Q. To her mother's?
A. Yes; to where she boarded.
Q. You were in the house eight months?
A. Yes; to a day.
Q. Mr. Kenyon enjoyed good health?
A. Yes; he was ready for his meals always, and enjoyed himself.
Q. And generally played croquet?
A. When anybody else went he would go too; he needed a little recreation; he was in his wife's room a good deal.
Q. He was very attentive to his wife?
A. Yes.
Q. Appeared to be very much attached to her?
A. Yes.
Q. Did they have much company?
A. Yes; quite a good deal.
Q. You saw quite a number of Mr. Kenyon's family there, did you?
A. Not a great many, but some.
Q. His sisters?
A. Yes.

Q. Often?

A. Not very often. After Mrs. Kenyon got poorly they would come up every day. They were there a good deal about the time of the funeral.

Q. During all this sickness and this croquet business?

A. They did not come to croquet. When they heard that Mrs. Kenyon was sick they came up every day.

Q. Was Mrs. Sutton there every day?

A. When Mrs. Kenyon was so low Mrs. Sutton was there.

Q. It was about five months from the time you got there until Mrs. Kenyon died?

A. Yes.

Q. She died in February?

A. Yes.

Q. And during those five months Mrs. Sutton was there, all told—after the croquet business suspended and cold weather commenced—about two weeks?

401 A. She only came up and stayed over night the first time, and then she staid longer when Mrs. Kenyon died. I was not watching the time about going and coming.

Q. Where did you go when you left Mrs. Kenyon's place in May, 1872?

(Objected to as immaterial.)

A. I went to Boston.

Q. How long did you stay in Boston?

A. I stayed there until September.

Q. You stayed in Boston until September, 1872?

A. Yes.

Q. Then where did you go?

A. I came to Connecticut.

Q. How long did you stay in Connecticut?

A. About three months.

Q. Until about December, 1872?

A. Yes.

Q. Where did you go in December, 1872?

A. I came down to New York with a friend of mine and stayed until the next May, and then I went to Chicago.

Q. You stayed until May, 1873, in New York, with a friend?

A. Yes.

Q. And then you went to Chicago?

A. Yes.

Q. Did you go alone?

A. No; with my daughter.

Q. How long did you remain there?

A. A year.

Q. Until May, 1874?

A. Yes.

Q. Then where did you go?

A. I came back.

Q. What did you do in Chicago?

A. I stopped with my daughter.
Q. Is she living in Chicago?
A. Yes.
Q. Married?
A. Yes.
Q. In May, 1874, where did you go?
A. I got married and went to my husband's home.
Q. Where was that?
A. It was within a block of where I live now.
Q. In New York city?
A. Yes.
402 Q. And since May, 1874, you have resided in New York?
A. Yes.
Q. Whereabouts?
A. The number was not on the house, but it is within a block of where I live now. It is on the same avenue, in this city, but it was not numbered then.
Q. What was your name at the time you were living at Mr. Kenyon's house?
A. Mrs. Wiswell.
Q. When did you see Mr. Kenyon in the bank?
A. Well, I saw him before that, after I left his house.
Q. Before what?
A. Before this date.
Q. Before 1874?
A. Yes; I saw him before that.
Q. In one of your trips in the city?
A. No; I went to church in Tremont, where he lived, one Sunday, and sat in his pew, and he saw me and I called there the next day.
Q. Was that soon after the funeral?
A. No; that was after I came back from Connecticut, before I went to Chicago.
Q. You stopped here a little?
A. I told you I stopped from fall to spring with a friend of mine.
Q. And during that interval you saw him at church?
A. Yes.
Q. And when did you see him at the bank?
A. The year that I was married.
Q. In 1874—after you were married?
A. Yes.
Q. Did he visit you at your house after you were married?
A. No; he never was at my house.
Q. Since you have been Mary Jane Steed?
A. No.
Q. After you were married and settled in New York in 1874, how often did you see Mr. Kenyon?
A. Well, I saw him in January and July generally, after that, when he would come on.
403 Q. Where would you see him?
A. I would go to the bank.

Q. You had business with the bank?
A. Yes; my husband had business there.
Q. And you would go there on business?
A. Yes; and I would see him.
Q. In summer time and winter both?
A. Yes.
Q. Generally when you would go there you would stop and have quite a long conversation?
A. No; not a very long conversation, but generally asked him how he was.
Q. Every time you went to the bank?
A. Yes; he generally shook hands with me, and I would ask him how he was; and I would ask him how Mr. and Mrs. Sutton were.
Q. How long would you remain in the bank?
A. While they were waiting on me or my husband.
Q. It was on these occasions that you had your interviews with him?
A. Yes.

(By consent the signature of the witness is waived.)

EDGAR K. BROWN, a witnessed called on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?
A. At 307 East 124th street.
Q. What is your business?
A. I am a lawyer.
Q. You knew Mr. John S. Kenyon in his lifetime?
A. Yes; he was my uncle.
Q. You have heard that portion of the testimony of Miss
404 Maria S. Kenyon in which she speaks of Mr. John S. Kenyon coming to New York in September, 1871?
A. I did hear it.
Q. Do you know the fact of Mr. Kenyon returning to Oconomowoc?
A. Yes; I do.
Q. Please state what you know.
A. I know that I accompanied him to the sleeping car. I carried his valise to the elevated station, and I accompanied him down in the car, and from the elevated station in 42d street to the waiting room, and waited there until he got his ticket, and accompanied him from the waiting room to the car, and deposited his valise in the car, and had some conversation with him, and returned.
Q. Who else accompanied you?
A. Nobody else. I was alone with him, and left him alone in the car. I was on the piazzo also when he arrived, and he came alone, carrying his valise.
Q. You accompanied him from the house at 307 East 124th street to the elevated railroad station, thence to the 42d street branch, and thence to the Grand Central depot, and thence to the waiting room?

A. Yes. I know he was very anxious to carry the valise himself, and he did not like the idea that I should carry it.

Q. Please state what his condition was as to condition of health at that time?

A. He seemed to be very well and strong—as strong as I ever knew him.

Cross-examination by Mr. WESTOVER:

Q. Why did you accompany him?

A. Because he was my uncle and I desired to do what I could for him.

Q. Do you always go with your uncles when they go anywhere?

A. I always loved my Uncle John and was glad to do anything I could for him.

Q. Was he particularly attached to you?

A. He might have been. I think I loved him as an uncle, and he might love his nephew, naturally, in return.

405 Q. It was his duty to love you, if you loved him, was it not?

A. Well, I think it might be.

Q. You mean to say it would not hurt him?

A. Not at all.

Q. How do you know that he came alone when he came from Oconomowoc?

(Objected to.)

A. I testified that he arrived alone. I saw only that part of his trip that extended from Second avenue up to our piazza. I was standing there.

Q. From Second avenue up to your piazza he was alone?

A. Yes.

Q. He was not alone, was he?

A. Yes.

Q. Was he not with you?

A. No.

Q. How do you know he was alone?

A. Because I sat on the piazza and saw him coming.

Q. You saw him approaching Second avenue?

A. Yes.

Q. So far as you could see him coming to the house he was alone?

A. Yes.

Q. That much of his trip you know about?

A. Yes.

Q. You do not mean to say that you were at the depot and received him?

A. No.

Q. But you did go to the station on his return to Oconomowoc?

A. On his return I went to the 42d street station—to the cars.

(By consent the signature of the witness is waived.)

A. N. BROCKWAY, a witness called on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?

A. At 44 East 126th street.

406 Q. What is your profession?

A. I am a physician.

Q. How long have you been a physician?

A. Since the first day of April, 1861.

Q. Do you know the parties to this controversy—Mrs. Sutton, complainant, and the executors of John S. Kenyon, defendants?

A. I cannot say that I know Mrs. Sutton; I have seen her.

Q. Did you know Mr. John S. Kenyon in his lifetime?

A. Yes.

Q. How many years had you known him?

A. Probably about 20.

Q. You were one of the consulting physicians at the time of his being stricken down?

A. Yes.

Q. Did you remain there during the period of his sickness?

A. I saw him at several times during the period of his sickness.

Q. Please state whether you did or did not see Mr. Kenyon frequently during the years previous to his death?

A. Well, I used, now and then, to see him. I cannot say that I saw him frequently.

Q. You were on intimate speaking terms with him?

A. Yes.

Q. How often did you see him from the year 1872 down to the period of his death?

A. Well, I cannot tell you that. I never kept any account of it.

Q. But you saw him frequently?

A. I saw him every now and then, yes.

Q. Please state where you saw him?

A. I saw him at his own house—that is, at Miss Kenyon's—used frequently to see him there of evenings. I used to see him at the Harlem Savings Bank, and used to see him in the street.

Q. Please state, from what you saw, and from the oppor-

407 tunities you had of judging, what the condition of Mr. Kenyon's health was, apparently, during the times that you saw him?

(Objected to.)

A. Well, I supposed him to be a man enjoying good health.

Q. At the time you met him on the street, and at other times when opportunity offered, did you converse with him?

A. Well, I think I merely said "How do you do?" or "Good morning," or something like that. I never entered into any extended conversation with him. I used to converse with him at the house, 307 East 124th street.

Q. Please state what you noticed about him during those periods which impressed you, as to weakened condition of body or mind.
A. I saw nothing that would indicate that.
Q. You are now and have been in active practice for many years?
A. Yes.
Q. Since 1861?
A. Yes, since the 1st of April, 1861.

Cross-examination by Mr. WESTOVER:

Q. Have you ever been called by Mr. Kenyon to attend him in his sickness?
A. No.

(By consent the signature of the witness is waived.)

MARGARET E. KENYON, a witness called on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. You know the parties to this controversy?
A. I do.
Q. You are a cousin of John S. Kenyon, deceased?
A. I am.
408 Q. You were present at the house at the time that Mr. Kenyon was stricken down, and up to the time of his death, or a portion of the time?
A. Well, not when he was stricken. I was not there then.
Q. State when you got there.
A. The next day.
Q. State how long you tarried there.
A. Well, I was there all the time from Friday afternoon until the time of his death.
Q. Please state during what portion of that time you saw, if at all, Mrs. Julia White there.
A. I do not remember seeing her at all.
Q. You are acquainted with her?
A. Not particularly acquainted.
Q. You know her?
A. Yes.
Q. She stated on her examination yesterday that she was present some two hours during the Friday, Saturday, and Monday; and that during that time Mrs. Sutton tended as the nurse of Mr. Kenyon, and that Mr. Kenyon's sisters seemed to be unable to render assistance, as their grief apparently overcame them, and their heads were in their hands. Please state what you noticed as to that.
A. I did not notice anything of that kind at all. I think they were perfectly composed, greatly to my surprise.
Q. Please state as to the care that was bestowed upon Mr. Kenyon then and there, if you know, and by whom, and what was done.
A. Well, by his sisters as a general thing; I think Mrs. Sutton also was there. We were all there. His sisters bathed his head and wet his lips, and did all that was necessary to be done.

Q. You had known Mr. John S. Kenyon for a number of years previous to his death?

A. I have known him all my life.

Q. Intimately?

A. Yes.

409 Q. And you had known his wife previous to her death?

A. Certainly.

Q. You remember Mrs. Kenyon's illness?

A. Yes.

Q. Please state whether Mr. and Mrs. Kenyon, at any time during her illness, remained at the house of your mother.

A. Yes.

Q. Please state when.

A. They came to our house on the 25th of November, 1869, and remained there until the first of August, 1870.

Q. Who cared for and attended upon Mrs. Kenyon, if you know, at that time?

A. Her husband.

Q. Was Mrs. Sutton there during the period?

A. She came occasionally and would stay a day perhaps. I think at one time she was there three days.

Q. Did I understand you to say that Mr. Kenyon exclusively attended to his wife?

A. He did; no one else.

Q. You stated you were well acquainted with Mr. Kenyon during his lifetime?

A. Yes.

Q. Did you see him often in Harlem or the upper part of the city previous to his death?

A. Why, yes; frequently. We were out of town a good deal ourselves.

Q. Please state what you noticed, if anything, in reference to his condition of health.

A. Nothing at all, or nothing in particular; nothing but that he was in good health.

Q. He appeared to be in good health?

A. Yes.

Q. To what extent was he active and busy, if you are able to say?

A. That I do not know much about. I did not know much about his business. I remember his coming home, Thanksgiving day; I remember his passing our house on Thanksgiving morning.

Q. What Thanksgiving morning was that?

A. The one previous to his death.

Q. That was the Thanksgiving of 1881?

410 A. Did he die in 1882?

Q. Yes.

A. Then it was in 1881.

Q. Where were you at that time?

A. In 124th street, and he passed our house to go to his own; we were boarding at the time.

Q. You were between the Second and Third avenues?

A. Yes; and we saw him pass, and spoke to him as he passed.
Q. Did he return the salutation?
A. Yes; he passed down to his own house.
Q. Do I understand you that he carried his own valise?
A. He was carrying his own baggage. There were Mr. and Mrs. Sutton and himself, and his arms were full. I thought it was a fishing tackle that he had, but I believe it was an umbrella and cane and such things that he had, packed up, and also his valise. I know he had his arms full.

(No cross-examination.)

(By consent the signature of the witness is waived.)

ELIZABETH B. KENYON, a witness called on behalf of the defendant, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?
A. At 307 East 124th street.
Q. And have resided there how long?
A. About twelve years.
Q. You know the parties to this controversy?
A. I do.
Q. Mr. John S. Kenyon was your brother?
A. He was.
Q. Please state whether Mr. Kenyon resided with you any
411 portion of the time from about 1872 down to 1879 or 1880.
A. As a general thing he staid with us winters. I think the first winter he went there he staid at Oconomowoc, but he came home and said it was so cold there that he did not stay there after that. I think it was the first winter that he went there that he staid there. He went there after his wife's death. Then he came up to our house, and generally calculated to be at the house by Thanksgiving; that was generally his calculation. We always expected him to be there to take Thanksgiving dinner with us.
Q. Please state what his habit was as to remaining at home during the period that he was staying there, and going forth from the house.
A. He always went out—almost always—immediately after breakfast. As a general thing he would go to the bank, and then he would come in and take his dinner, and take his nap in the chair, and then he would go out again—he would generally go out; and then would come about 6 or before 6, and take a nap in his chair again, and have his tea, and then, I think, I may say that he would almost every evening go out.
Q. Had he a good appetite?
A. An excellent appetite. I don't know that I ever knew him to lose a meal while he was at the house.
Q. Please state what you know about the trouble he had in his head.
A. He had sometimes a headache, and would sometimes complain

of neuralgia in his head, but it never kept him at home. He would complain of it in the morning and then go out just the same.

Q. How did it affect him as to taking care of himself?

A. It never affected him in the least.

Q. What was his habit as to waiting upon himself?

A. He always waited upon himself—was always in the habit of waiting upon himself. Even when his wife was alive he always waited upon himself.

412 Q. You remember the fact of Mr. Kenyon's living at Tremont?

A. I do.

Q. Please state what you know.

A. I know I was there a great deal of time, particularly during Mrs. Kenyon's last sickness. During her last sickness I was there during two or three weeks of the time.

Q. Who cared for her?

A. Mr. Kenyon had the entire care of her. I don't think any other person handed her a cup of water even.

Q. Mrs. Sutton was there?

A. She was there, but while there she was called away. Her husband was sick most of the time. She seemed to prefer to be at Mr. Kenyon's, but at that time she felt that she must go—very much against her will, I presume.

Counsel for defendants moves to strike out the expression "very much against her will, I presume."

Counsel for complainant objects to such striking out.

Q. What service did you notice was rendered by Mrs. Sutton during the time that she was there?

A. At Tremont?

Q. Yes.

A. Not any service particularly. I didn't notice that she rendered any service particularly.

Q. You remember the fact of Mr. Kenyon's death?

A. Yes.

Q. Were you present?

A. I was.

Q. From the time he was stricken down to the time of his death?

A. Yes.

Q. Who were present there besides yourself?

A. The whole family were present and my two cousins and nephew.

413 Q. Please state what attendance was given to Mr. Kenyon in that state, and by whom?

A. Well, there was very little required—merely to lay a wet rag on his head occasionally, and keep his mouth washed. I did it very frequently, and Mrs. Sutton would do it occasionally.

Q. To go back for a moment: Please state whether you accompanied Mr. and Mrs. Kenyon, previous to her death, to Saratoga.

A. I did not accompany them there.

Q. Please state the circumstances; you were there at one time with them?

A. She was there and taken worse, and Mr. Kenyon sent for me, and I went on, and was with her several weeks.

Q. Was Mrs. Sutton there?

A. Mrs. Sutton was not there.

Q. Please state whether you had any conversation with Mrs. Sutton, or with Mr. Sutton when Mrs. Sutton was present, after the death of Mr. Kenyon.

Objected to.

A. I had no particular conversation, except at the time of the will.

Q. State that.

A. At the time the will was read Mr. and Mrs. Sutton were present, and at that time, after the will was read, Mr. Sutton spoke of Mr. Kenyon's place at Oconomowoc, and said that Mr. Kenyon thought of hiring an architect, or some one to take charge of the business, as it was a good deal of trouble to him, and Mr. Sutton says, "Why, Mr. Kenyon, I will take charge of it; I have nothing particular to do. You provide the money and I will engage the men and pay them, and take the whole charge of it for you." "And now," says he, "can't I bring in a bill for my services from the first of September until about the middle of November?"—about the time that they came on to Harlem, the Thanksgiving day. We im-
414 mediately said—I think we all of us at once said we supposed he could.

Q. Was Mrs. Sutton present?

A. Mrs. Sutton was present, and heard him ask the question.

Q. Was anything then said by Mrs. Sutton in reference to Mr. Kenyon's placing money in Mr. Sutton's hands? If so, what?

A. He didn't place it in his hands particularly, but that Mr. Sutton could draw on him to pay off his hands, as he employed them.

Q. Who made that statement?

A. It was a general thing that was said there; he said that Mr. Kenyon found the money and Mr. Sutton paid the hands.

Q. From your observation and from what you saw of Mr. Kenyon during the period that he resided with you, what was the general condition of his health, if you are able to state it?

A. I considered it good. I think there was one winter—I think the first winter that he didn't reside with us, but stayed at Oconomowoc, he concluded that it was too cold there and after that he stayed with us winters, until he went to housekeeping. His health, we considered, was generally good.

Cross-examination by Mr. WESTOVER:

Q. Did Mr. Kenyon take Thanksgiving dinner with you in 1872?

A. That was the spring that his wife died, was it not?

Q. It was the Thanksgiving following?

A. I cant say that he did, because he went to Oconomowoc that summer, and I couldn't say that he was home. I think that was the winter that he stayed all winter.

Q. Thanksgiving is generally in November, is it not?
A. Yes.
Q. Has it always been in November here?
A. Always.
415 Q. The same day is observed here as is appointed by the President?
A. Yes.
Q. In 1873 that day was in November?
A. Yes.
Q. Was Mr. Kenyon at your house that Thanksgiving?
A. That I could not say. I think that was the winter that he stayed in Oconomowoc, after his wife's death.
Q. This was the second winter. The first winter after his wife's death would be the winter of 1872. I am speaking about the winter of 1873.
A. I couldn't say about that.
Q. In the winter of 1874—at the Thanksgiving period—November, 1874—was Mr. Kenyon at your house?
A. I could not say positively.
Q. Can you say positively that he arrived in New York previous to the 21st day of December of that year—1874?
A. I could not say anything about those days, but I know he generally calculated to be at home on Thanksgiving.
Q. Do you know on what day Thanksgiving was in November, 1875?
A. It was generally from the 28th to the 29th of November.
Q. Do you recollect Mr. Kenyon's being at your house for Thanksgiving of that year?
A. I do not.
Q. How about 1876 Thansgiving day—do you remember that specially?
A. I know that as a general thing he was there on Thanksgiving day, and we always expected him at that time.
Q. How about 1877—was he there Thanksgiving day then?
A. I could not say,
Q. In the years from 1872 to 1878, inclusive, being seven years, how many of those Thanksgivings did Mr. Kenyon spend at your house?
A. Well, I could not say. I think as a general thing he spent his Thanksgivings at our house, but when it comes to putting it
416 down and saying that he was there such a day, that I could not say.
Q. Will you swear that in the seven years from 1872 to 1878, inclusive, Mr. Kenyon was at your house more than three Thanksgivings?
A. I won't swear to it at all?
Q. In the 84 months included in those seven years, will you testify that Mr. Kenyon spent more than 30 of them in New York?
A. I couldn't testify to it at all.
Q. You said that Mr. Kenyon was in the habit, with his wife, of waiting upon himself?

A. I said even when his wife was alive he was in the habit of waiting upon himself.

Q. Do you mean to say by that that his wife was not in the habit of waiting upon him?

A. She didn't run and bring his slippers and coat, and comb his hair, and all those things.

Q. She was not a very healthy woman, was she?

A. She was, until her last sickness, generally considered a healthy woman.

Q. Do you know of what disease she died?

A. Yes.

Q. How long was she sick of that disease?

A. It was in 1869, I think, that she broke up housekeeping, and from that time until she died she complained of that disease.

Q. She was not very well during that time?

A. No. That I call her last sickness.

Q. Previous to that she was a healthy woman?

A. Previous to that she was apparently a healthy woman.

Q. Did you go to Mr. Kenyon's house on the night when he was taken sick with his final sickness?

A. I did.

Q. How soon after he was first taken sick?

A. Immediately—the moment he was taken; she sent the girl after us.

Q. Who sent the girl after you?

A. Mrs. Sutton.

417 Q. And who went with you?

A. My sister.

Q. Your sister Maria?

A. Yes.

Q. She has testified to having gone there very soon after being sent for?

A. She went immediately.

Q. You went with her?

A. Yes.

Q. Where was Mr. Sutton?

A. He was down town.

Q. He was not at the house?

A. He was not at home.

Q. Was the girl there?

A. The girl was there.

Q. The girl was sent for you?

A. Yes.

Q. Who else was there?

A. There was not anybody else.

Q. Mr. Kenyon and Mrs. Sutton?

A. And my sister and myself and the girl; when we arrived the doctor had not arrived.

Q. You arrived before the doctor?

A. Yes.

Q. No one was there at that time but Mr. Kenyon and Mrs. Sutton and the girl?

A. That was all.

Q. Was the girl sent for you before she was sent for the doctor, or was it all one errand?

A. I couldn't say. but I think it was all one errand; we lived exactly opposite Mr. Kenyon's.

Q. And near Dr. Hills'?

A. He lived on the back block.

Q. On the same side of the street that you live?

A. No; on the other side.

Redirect examination by Mr. ERASTUS F. BROWN:

Q. What was said, if anything, after the death of Mr. Kenyon by Mrs. Sutton in reference to payment of board by Mr. Kenyon at Oconomowoc?

A. She told me that Mr. Kenyon was in the habit of paying board,
but she said latterly, the last few weeks he was there, he was
418 not so regular. He most generally paid on the day, but sometimes he would go over the day, sometimes two days; he was not so regular as he had been.

Q. Did she state the amount?

A. Yes; she said that he paid $10 a week.

Q. You are acquainted with Mrs. Julia White?

A. Not particularly.

Q. You know her by sight?

A. I know who she is.

Q. Do you know her by sight?

A. I do not think that if I should meet her in the street I should know her.

Q. Do you know whether she was at the house?

A. She called at the house; she was not in his room. I do not think she was in his room at all. I have not the slightest recollection of her being in his room. She called at the house, I think, once or twice while he was sick; I do not think more than that; but I do not think she was in his room at all.

Q. Where was Mr. Kenyon—in the back parlor?

A. In the back parlor. When friends came in they generally sat in the front parlor.

Recross-examination by Mr. WESTOVER:

Q. Did you stay there nights while he was sick?

A. Every night.

Q. Miss Maria was in the sick-room nights as much as you?

A. She was in the sick-room at night.

Q. Not as much as you?

A. Not quite as much, because she was not able to stand it. Her health was not good, but she was there in the house.

Q. Were you in the sick-room all night?

A. All night.

Q And all day each day?

A. The latter part of the time I would go and lie down two
419 or three hours, but some of the rest of them were there; my cousins were there all the time.

Q. Who are they?

A. Miss Margaret Kenyon is one, and her sister Maria.

(By consent the signature of the witness is waived.)

CAROLINE P. BROWN, a witness called on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?

A. At 307 East 124th street.

Q. You know the parties to this suit?

A. I do.

Q. You were intimate with Mr. Kenyon—he was your brother?

A. He was my brother.

Q. And you were intimate with him during his lifetime?

A. Yes.

Q. You remember the fact of his residing at the house?

A. I do, very well.

Q. Please state generally what his condition of health was when he was there?

A. Very good, indeed, with exception of headaches occasionally

Q. You remember the fact of Mr. Kenyon's death?

A. I do.

Q. Subsequent to Mr. Kenyon's death please state whether you met and had any conversation with Mrs. Sutton or with Mr. Sutton when Mrs. Sutton was present?

A. I had.

Q. How many conversations?

A. There were two.

Q. Please state where the first took place.

A. The first was at our house immediately after the reading of the will.

Q. Who were present at the reading of the will?

420 A. My sisters and Mr. and Mrs. Sutton and my cousin Samuel.

Q. And yourself?

A. And myself.

Q. Please state the conversation.

A. Mr. Kenyon read the will. After the reading of the will Mr. Sutton said that in September Mr. Kenyon had said that he thought he would hire an architect to take charge of the house and pay the men, and so forth, and Mr. Sutton said he would do that; if Mr. Kenyon would place the money in the bank he would pay the men and take the whole charge of it, and he said that Mr. Kenyon did so.

Q. What was said, if anything, about the compensation at that time?

A. Then Mr. Sutton asked if we didn't think he ought to bring in a bill for it; he had been occupied every day from in September until November, when they started for home, and we said we thought he ought to be paid for it.

Q. Did you have any other conversation?

A. We had another conversation—not exactly a conversation, but we were up on the third floor in my brother's house, and we were talking, and Mrs. Sutton spoke of the things in the house belonging to her—

DEFENDANTS' COUNSEL: I do not care about that.

Q. (Showing to witness a book labelled on the cover "Expense Book, 1862, to —— ———"). Please look at that book and tell me if you have seen it before.

A. I have.

Q. Where did it come from?

A. From Mr. Kenyon's secretary or desk.

Q. You looked into the secretary, or desk, at the request of the executors?

A. Yes.

Q. Please state in whose writing it is.

A. It is my brother's handwriting.

421 Defendants' counsel offers in evidence the following entries in said book, which offer is objected to by counsel for complainant, namely:

On the page marked at top with the letter "A," the heading "cash expended," and the item "Sept. 9 (1881), C. T. S., for building, $1,000."

Also, on same page, the item appearing under date of (Sept. 30), "C. T. Sutton, building, $1,000."

The said items are marked, respectively, Exhibits "2" and "3," "June 1, 1883."

Q. (Showing a paper to witness.) Please look at this paper and state whether that was also found among Mr. Kenyon's papers.

A. It was.

Said paper is offered in evidence by counsel for defendants, and is marked Exhibit 4, June 1, 1883.

It is a policy of fire insurance from the "Insurance Company of North America," office No. 232 Walnut street, Philadelphia; it is dated November 2, 1881, and is in favor of Mr. John S. Kenyon, Oconomowoc, Wis.," on a dwelling, the amount of the policy being $2,000, and the number of the policy 268; it is signed "Charles Platt, president; Mathias Maris, secretary," and is countersigned at Oconomowoc, Wis., November 2, 1881: "Louise C. Williams, agent." The description of the property, &c., reads as follows:

"By this policy of insurance the president and directors of the Insurance Company of North America, in consideration of the receipt

of eighteen dollars, do insure John S. Kenyon against
422 loss or damage by fire to an amount not exceeding two thousand dollars, as follows:

"On his two and one-half story frame detached dwelling house, with brick and stone basement, situate on the south side of Lac La Belle, and known as The Oaks; permission given for the said dwelling to remain unoccupied a portion of each year during the life of this policy if desired by the insured."

Lightning clause:

"In consideration of five dollars, extra premium, paid by the assured, a carpenter's risk is granted on the building covered by this policy for 30 days from this 2d day of November, 1881."

The original paper is retained by the executors to be placed in the hands of the counsel for the defendants.

Q. (Showing a book to witness.) Please look at this book and state whether it was found by you among Mr. Kenyon's papers.
A. It was.
Q. (Indicating an entry in said book.) In whose handwriting is that entry, if you know?
A. In my Brother John's.

Said book is a pocket diary for the year 1881, and from it the defendants' counsel offers in evidence the following entry, under date November 8, 1881: "Insurance, $23 (on house, 18; on carpenter, 5").

Said entry is marked Exhibit 5, June 1, 1883.

423 (No cross-examination.)

(By consent the signature of the witness is waived.)

Further hearing adjourned to June 2, 1883, at 11 a. m.

(Title of the cause.)

NEW YORK, *June* 2, 1883.

Hearing resumed.

Present: Counsel as before, and Mr. Erastus F. Brown, one of the defendants, in person.

SAMUEL H. VIRGIN, a witness on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?
A. At 32 East 125th street.
Q. What is your profession?
A. A clergyman.
Q. Of what church?
A. The Pilgrim, of New York.

Q. Formerly the Congregational Church, of Harlem?
A. Yes.
Q. The Pilgrim Church is now situated where?
A. On Madison avenue, corner of 121st street.
Q. Formerly it was located where?
A. On the corner of 125th street and Second avenue.
Q. How long is it since the old place of worship was abandoned for the new?
A. We left the old place the last Sunday in December, 1882.
Q. Do you know the parties to this controversy, Erastus F. Brown and Francis A. Kenyon, executors, as defendants, and Sarah S. Sutton, complainant?
A. I do, sir.
424 Q. Did you know John S. Kenyon in his lifetime?
A. I did.
Q. How long had you known him?
A. I should say about ten years, more or less.
Q. During what portion of the time that you knew him have you resided where you at present reside?
A. I have lived in my present house four years.
Q. How near is your present house to the Presbyterian church of Harlem?
A. Almost opposite.
Q. And where did you formerly reside?
A. At No. 220 East 124th street, between Second and First avenues.
Q. Had your acquaintance with Mr. Kenyon been at all intimate during his lifetime?
A. Hardly intimate.
Q. You have met him in company?
A. Yes; constantly, frequently.
Q. Please state at what places, if you recollect.
A. At the house of Mr. Erastus F. Brown and the sister of Mr. Kenyon, 307 East 124th street, very often.
Q. Please state the occasions generally when you have met him there.
A. On Thanksgiving days and Christmas days, when I have been accustomed to take dinner with the friends there, Mr. Kenyon has almost invariably been present; often evenings also; often when I have gone into the house; when he was home I would almost always find him there.
Q. Did you partake of Thanksgiving and Christmas dinners there with him?
A. Yes; almost invariably found him there on those occasions.
Q. If there were turkeys or other things to carve on those occasions, who generally did it?
A. Mr. Kenyon. I generally sat by his right. He almost always sat at the head of the table and did the carving.
425 Q. He had the honor of presiding?
A. He had. He always seemed to enjoy it, as the rest of us did.

Q. He did the carving?

A. Yes.

Q. What did you notice as to his appetite?

A. I thought he enjoyed the meal as well as the rest of us; he stayed as long as the rest and ate as well as anybody.

Q. You spoke of meeting him in the evening; you would meet him in the evening there, also, would you?

A. Very frequently.

Q. State generally what was his manner and appearance during the time that you met him in the dining-room and in the parlors.

A. He always seemed to be at home; thoroughly at rest; perfectly happy; in a good, healthy, happy condition for a man of his years.

Q. Have you met him on the street at all?

A. Often.

Q. When and where, if you please, about?

A. On 124th street, going to the home. I have met him at the bank, of which, I think, he was an officer for a time, and have met him on 125th street; used to meet him very often Sunday morning going to church. I would very often pass him on the street Sunday mornings and evenings.

Q. Do you know where he resided at that time?

A. On 124th street. I do not know the number, but it was opposite the house occupied by Mr. Brown and Miss Kenyon.

Q. Please state generally what was his apparent general condition of health, as to strength and vigor, during these times that you met him on the street.

A. He seemed to be as well as any man of his years. I did not notice anything but that he was a man of perfect health.

Q. How as to spirits?

426 A. He always seemed bright and cheery when I met him; earnest and cordial, always.

Cross-examination by Mr. WESTOVER:

Q. What was the first thanksgiving that you took dinner with him at Mr. Brown's?

A. It is impossible for me to answer that.

Q. Can you tell any of them?

A. No, sir; I cannot fix them. I have been accustomed to take dinner with them for a great many years—for about twelve years—but I cannot pick out the different Thanksgivings.

Q. Was Mr. Kenyon always there at the different Thanksgiving dinners you took there?

A. I associate him in my mind with the dinners there.

Q. You take dinner there every year, do you, at Thanksgiving?

A. I generally do; Thanksgiving or Christmas, or both, sometimes.

Q. I am talking about Thanksgiving now. How often have you met Mr. Kenyon there at Thanksgiving?

A. I cannot tell you.

Q. Have you met him there three times in ten years at Thanksgiving?

A. I have met him frequently.

Q. Can you tell us more than three times?

A. I can tell you that I have met him there frequently on Thanksgiving. I cannot tell you the exact number.

Q. How many times does it take to be "frequently?"

A. I have been there twelve years and have met him very frequently there. I won't say that it was more — six or three or two.

Q. Can you define the term "frequently" as you use it?

A. I use it according to the ordinary interpretation of Webster's Dictionary.

Q. What is that interpretation?

A. You can look at it and see.

427 Q. Do you know?

A. You can look at it and see.

Q. Is that your answer to my question?

A. Yes, sir.

Q. Do you know what the word "frequently" means?

A. Yes.

Q. What does it mean?

A. It means what is put down in the dictionary—the ordinary meaning of the word.

Q. What is put down in the dictionary?

A. The meaning of the word.

Q. That is all you answer me?

A. That is all I answer you.

Q. Then you decline to state?

A. That is my answer.

Q. In what sense do you mean the word when you say you dined "frequently" with him at Thanksgiving?

A. The proper sense.

Q. If you dined with him once in twelve years would you call that "frequently?"

A. No, sir; that is not the ordinary meaning of the word.

Q. If you dined with him twice in twelve years would you call that frequently?

A. No, sir; that is not the ordinary meaning of the word.

Q. If you dined with him three times in twelve years would you call that "frequently?"

A. Probably not.

Q. If you dined with him four times in twelve years would you call that "frequently," on Thanksgiving?

A. If they were four successive years, and the other eight made a period by itself, I should not.

Q. How were those; were those successive Thanksgivings?

A. I cannot tell you, sir.

Q. Can you tell whether you dined with him on Thanksgiving 1872?

A. No, sir.

428 Q. Do you know whether he was in the city of New York on Thanksgiving, 1872?

A. I do not know, sir.

Q. Do you know whether he was in that city on Thanksgiving, 1871?

A. I do not.

Q. Do you know whether he was in that city on Thanksgiving day, 1873?

A. I cannot say. I have not looked at the dates nor fixed my mind upon them.

Q. Can you tell whether he was in the city on Thanksgiving 1874?

A. I cannot state.

Q. Or 1875?

A. I decline to define any date.

Q. You cannot tell any of those dates?

A. I decline to define any single separate date.

Q. From the year 1871 to 1879, exclusive of 1879—from 1871 to 1878, inclusive—can you testify that you took Thanksgiving dinner with Mr. Kenyon to exceed twice?

A. I am not willing to define any date.

Q. I am not asking about dates, but between those years?

A. Sometimes it was Thanksgiving that I was there, and sometimes Christmas.

Q. I want to see how near right you were in testifying that you dined with him frequently. From 1871 to 1878 gives you seven or eight years. Will you testify that you took Thanksgiving dinner in New York with Mr. Kenyon more than twice?

A. I won't testify anything about it, sir, except to say that my standing custom was to take dinner, one year at Thanksgiving, another at Christmas, or as it might come, in that house, and in the majority of cases Mr. Kenyon was present.

Q. In the majority of Thanksgiving cases?

A. I did not say Thanksgiving cases; I said Thanksgiving or Christmas.

Q. Did I understand you to say that he was there the majority of Christmases?

429 A. Christmas or Thanksgiving, or both, when I have been there.

Q. Have you been there the majority of cases on Thanksgiving day?

A. I have—either the Thanksgiving day or the Christmas day; not always both the same year; seldom both. If I was not the reat Thanksgiving, I generally was at Christmas.

Q. You say you ate at either one meal or the other the majority of those years?

A. Yes.

Q. You are not sure you were there the majority of the Thanksgivings in the eight years?

A. Certainly not.

Q. And you are not sure that he was there the majority of the Thanksgivings during those years?

A. I am sure he was there the majority of the times I was there, but I cannot say how many. On very few of the times that I have been there on Thanksgiving day or Christmas has Mr. Kenyon been absent. In fact, I cannot put my mind on a single day in which he was absent; but I would not put my mind on a date when he was not.

Q. You are just as sure of his being there on Thanksgiving as Christmas?

A. Yes.

Q. And you have met him there as many times on Thanksgiving as Christmas?

A. When I have been there Christmas.

Q. Well, which have you been there most?

A. I cannot tell you.

Q. Do you know whether you have met him there most on Thanksgiving or Christmas?

A. I do not know which times I have been there most.

Q. Do you know how many times you have met him there in those years?

A. I know that I have met him there when I have been there.

Q. Do you know that you have been there yourself four times in eight years?

A. Yes.

430 Q. Have you met him there almost always?

A. Almost all the time. I have no distinct remembrance of his absence, but have a distinct remembrance of his being there continually.

Q. You have been there at either Christmas or Thanksgiving every year for eight years?

A. Almost every one—my custom was to be there. I do not think he was absent any one of those times. I cannot recall his absence. He may have been absent.

Q. You cannot testify at any particular time that he was absent?

A. To put the date to it?

Q. Yes.

A. No; I am not willing to.

Q. And you will not swear that he was there more than twice on Thanksgiving day during those eight years?

A. Certainly I will swear that if it was eight, he was there five times or six times, but I won't define the times. I will swear, as I have sworn already, that the custom of Mr. Kenyon was to be present at those gatherings at that place. My memory recalls him as customarily present at the head of the table.

Q. Now, if it should turn out that Mr. Kenyon was not in the city of New York six years on Thanksgiving day out of the eight, then what would you say?

A. I should hold to what I have already said.

Q. You would still hold that he was in New York?

A. I should still hold to what I have said, that it was customary

for him to be present at Miss Kenyon's house for dinner on Thanksgiving or Christmas.

Q. Whether he was in New York or not?

A. When he was here.

Q. Oh, when he was here?

A. Yes.

Q. Then, you won't testify that he could eat Thanksgiving here when he was West?

A. I am a sensible man, sir, and wish to be spoken to as such.

431 (The question is objected to by counsel for defendants as offensive.)

The WITNESS: The question is an insult to a man of intelligence.

Q. Did you eat Thanksgiving dinner with Mr. Kenyon at Mr Brown's house in the year 1879?

A. I decline to fix any date?

Q. Did you eat in the 18—

A. (Interrupting.) I decline to fix any date.

Q. You have not let me put my question. I may put a date that you will remember?

A. I decline to fix any date.

Q. Did you eat Thanksgiving dinner there in the year 1881?

A. I decline to fix any date.

Q. The Thanksgiving previous to Mr. Kenyon's death?

A. I decline to fix any date.

Q. Is it out of your power to state whether you ate Thanksgiving dinner with Mr. Kenyon the Thanksgiving previous to his death?

A. I cannot fix any date.

Q. Do you recollect whether you did or not?

A. I cannot fix any date.

Q. Do you know whether you ate Christmas dinner there on the Christmas previous to Mr. Kenyon's death?

A. I cannot fix any date.

Q. Do you recollect Mr. Kenyon's death?

A. I do, sir.

Q. Do you know in what year he died?

A. I do not remember the date.

Q. Were you present during his last sickness at his house?

A. Yes.

Q. Do you remember the year?

A. I cannot fix the date.

432 Q. Do you know whether it was this year or last?

A. I do not know whether it was this year or the year before.

Q. Your recollection of dates and times is poor.

A. I fix localities by reference to books; I have no books here.

Q. And events; how do you fix events?

A. I recall events as they stamp themselves on my mind.

Q. By the occurence itself?

A. By the occurrence itself.
Q. And the surrounding circumstances?
A. And the surrounding circumstances.
Q. You cannot recollect the dates of events?
A. I can if I am prepared beforehand. I have made no preparation.
Q. If you are "prepared"—what do you mean? Do you mean if you could refresh your recollection?
A. It is my custom to dine with people and visit sick people and attend funerals every day of my life, and it is quite impossible for me to remember special instances of this kind when they occur every day of my life.
Q. Is it impossible for you to fix any date of a series of years that you have taken a festive dinner at any house?
A. Yes, sir.
Q. How long have you resided in New York?
A. Twelve years.
Q. Was Mr. Kenyon a member of your church?
A. He was not, sir.
Q. Is the executor, Mr. Erastus F. Brown, a member of your church?
A. He is, sir.
Q. Are his family or the members of his family attendants at your church?
A. They are, sir.
Q. For how many years have they been attendants at your church?
A. They were there when I went there.
Q. In the church?
A. Yes.
433 Q. And how long have you been there?
A. Twelve years.
Q. And they have all been connected with the church for those years?
A. Yes.
Q. Mr. Kenyon's sisters?
A. Yes.
Q. Mr. Kenyon himself attended another church in Harlem, did he not?
A. Yes.
Q. What was the name of that church?
A. The Harlem Presbyterian Church.
Q. And that is the one you testified as being near you?
A. Nearly opposite the house.
Q. What acquaintance did you have with Mrs. Sutton?
A. Very slight.
Q. I understood you, in your direct examination, to say that you were acquainted with Mrs. Sutton.
A. Yes; that I was acquainted with her.
Q. Simply?
A. Yes.

Q. How much do you mean by "very slight"—what was your association with Mrs. Sutton?

A. I have been introduced to her—I have met her; I have seen her in Mr. Kenyon's house. I have bowed to her on the street always; that is about the extent of my acquaintance.

Q. Do you know by whom you were introduced to her?

A. No, sir; I cannot say.

Q. Do you know where you first met her?

A. No, sir; I cannot say.

Q. Did you ever see her in Mr. Kenyon's house in 124th street?

A. Yes; I saw her there the day I called upon him when he was sick.

Q. During his last illness?

A. Yes.

Q. After he was stricken down?

A. Yes.

Q. Did you ever visit that house previous to that final sickness?

A. I should say not.

Q. Do you know how long they resided there?

434 A. Not exactly, but I should answer a few years—not continuously, but portions of the time.

Q. Do you know what years they were that they resided there?

A. In the years immediately preceding the present time.

Q. Or preceding his death, do you mean?

A. Preceding his death.

Q. You do not mean preceding this time—to-day?

A. Preceding his death.

Q. When did your church change its name?

A. Last year some time; I cannot fix the date; either at the annual or local meeting, I cannot tell which.

Q. What was its corporate name previous to the change?

A. The corporate name is the Society of the Congregational Church of Harlem. The church is not incorporated; it is a society. The business of the Congregational Church is done under the name of Society of the Congregational Church of Harlem.

Q. It is known by that name?

A. It is generally known as the Harlem Congregational Church.

Q. Its business was transacted under the name of —?

A. The Society of the Congregational Church of Harlem.

Redirect examination by Mr. BROWN:

Q. When were you first spoken to about testifying about this controversy—in reference to testifying here?

Objected to, there having been no cross-examination on that point.

A. Last evening at six o'clock, as I sat at supper.

(By consent the signature of the witness is waived.)

HENRY P. MCGOWN, a witness called on behalf of the defendants, being duly sworn and examined, testified as follow:

435 Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?

A. At 1982 Madison avenue.

Q. Please state your professon.

A. I am an attorney and counsellor at law. I am also justice of the ninth district court in this city.

Q. Do you know the parties to this litigation—Sarah S. Sutton, complainant, and Erastus F. Brown and Francis A. Kenyon, executors, defendants?

A. I Know Mrs. Sutton, and I know Mr. Brown, and I have seen Mr. Kenyon.

Q. Were you acquainted with John S. Kenyon in his lifetime?

A. I was.

Q. And for how many years previous to his death, if you recollect?

A. I will say 40.

Q. How near have you resided to each other?

A. Until the last few years we never lived over a half mile apart, or about that. The last few years I understand Mr. Kenyon spent the larger portion of his time out West, but still had a residence in Harlem.

Q. During that period of time did you meet and see him often?

A. In the early years I saw him, I may say, almost daily, but for the last ten or twelve years I have not seen so much of Mr. Kenyon. I have seen him at different times throughout the year.

Q. Have you had business transactions with him at any time?

A. I have.

Q. Your office is 76 Nassau street, in the city of New York?

A. Yes.

Q. Has Mr. Kenyon ever met you at his office?

A. He has.

Q. Please state whether on more than one occasion.

A. Several occasions.

Q. Approximate, as near as you can, to the time—the years.

436 A. Well, I am bad at fixing dates, but my impression is that the last time I saw him at my office was—if you can fix the time when he made his last will.

Mr. E. F. BROWN: In 1879.

Answer continued: It is my impression that that is the last business transaction I had with him at my office. I am speaking now of business.

Q. Please state whether he came alone or attended at that time.

A. Alone.

Q. And left there alone?

A. Left alone. I would state in this connection that when I speak of business transactions I refer to two interviews where I did business for him. I saw him at different times throughout the year. He at that time held a mortgage on property that I had, and I used to pay him interest and used to see him often.

Q. Where did you meet him usually on the payment of interest?

A. I have met him at my office. I have met him at the Harlem Savings Bank; and my impression is that very often I have communicated with him by mail—inclosed checks to him.

Q. When you met him at your office, do you recollect any time when he came there attended?

A. Never.

Q. Please state from your observation, during the time he was at your office, what was his apparent condition of health?

A. Pretty good, as far as I could see. I never discovered anything different.

Q. You have met him at the Harlem Savings Bank. How was he engaged there, if you recollect?

A. I met him when he was an officer, I think, of the bank. I met him there evenings on several occasions, when I could not find him in the daytime. I recollect meeting him in the president's room when I have paid him interest—in the small
437 room in the rear of the Savings Bank. I have also seen him at the bank when I have called there on other business—seen him engaged at the desk.

Q. From what you saw of him, and observed during the time that you met him at the Harlem Savings Bank, what was his apparent condition of health?

(Objected to as repetition.)

A. Always good as far as I know.

Q. You have testified that you have met him on the street also?

A. Yes.

Q. How far have you met him at any time from the place of his residence, 308 East 124th street, if you recollect?

A. The last time I met him my impression is—I think it was the last time—was on 125th street, almost directly in front of my courthouse; that is, on 125th street, between Lexington and Fourth avenues.

Q. You have met him on other occasions in the street?

A. Repeatedly—passed him in the street.

Q. From what you observed and saw during those occasions when you passed him in the street, please state, if you recollect, what was his apparent condition of health.

(Objected to as repetition.)

A. It was good, as far as I know, as far as I could see.

Q. Please state on what occasions, if you recollect, you met him accompanied and attended.

A. Whereabouts?

Q. On the street.

A. I never recollect of meeting him in my life, accompanied, on the street; that is, I speak now, within the last three or four years. My meeting him on the street would be upon his return or about going out West. I would meet him sometimes on the street on his return, and we would be speaking about fishing and sailing, and he would tell me what he was doing there; and also about gunning.

438 Q. Your social relations were intimate?
A. Yes.
Q. Have you ever met him during the last few years in the lower part of the city of New York, on the street, if you recollect?
A. I cannot recall any time that I ever met him in the lower part of the city, except at my office.
Q. Your acquaintance with him commenced at an early period?
A. When I was a young lad.
Q. And your acquaintance then was close?
A. Very.
Q. Taking those first twenty years of your acquaintance and intimacy, and his condition of health apparently, at that time—how did it compare with his condition of health during the last ten years, if you recollect?

(Objected to as incompetent.)

A. I didn't discover any difference in his general health, except, of course, that he grew older. We were both growing older together. That was the difference.

Cross-examination by Mr. WESTOVER:

Q. Which was the elder, Mr. Kenyon or you?
A. Mr. Kenyon.
Q. His appearance was very much older than yours?
A. I do not recollect. I shall be sixty if I live to my next birthday, in December. I knew that he was carrying on business as a harness-maker and trunk-maker in Harlem when I was quite a young lad—16 or 17 years old.
Q. His appearance was that of a very old man?
A. No, sir; I do not think it was. I do not think he appeared to be as old as I am.
Q. How was his hair?
A. I do not think his hair was even gray; not what you would call gray hair.
439 Q. How was it as to quantity—in the last years of his life?
A. I do not know that I ever noticed that particularly. The times we met I think it was in the street, and he had his hat on.
Q. Would you testify that he had a fair head of hair, or was he nearly bare-headed?
A. I should say fair.
Q. What was the color?
A. I should say brown. It was not what you would call black hair.
Q. I refer now to the last few years of his life?
A. I could not say; but I think it was what you would call brown.
Q. What was the color of his eyes?
A. I couldn't say.
Q. Do you know whether he wore false teeth or not?
A. I never examined; I could not say.
Q. You never knew?

A. No.

Q. Did you ever talk with him about his health; I mean did you ever ask him specially about his health?

A. I have met him and said, "John, how do you feel?" The answer was, "Good." I met him, I remember, once, and said, "You are getting fat," and he said, "I feel first rate."

Q. And these little meetings and conversations were all you had with him as to his health?

A. Yes.

Q. Those were generally on the street, or away from his house?

A. Oh, yes; I do not think I ever saw him at his house, except on one occasion—that was on his death-bed, when he was taken down. I had occasion to look for him at the Harlem Bank, one time, and they referred me to his house, and I recollect going in and sitting down in the back room.

Q. What house was that?

A. It was the house on the south side of 124th street, near Second avenue.

Q. How often was the interest payable on that mortgage?

A. Every six months.

440 Q. And you paid it pretty promptly?

A. Yes.

Q. Twice a year?

A. Yes; it might have gone sometimes 15 days; sometimes 30 days; sometimes he would write and tell me to hold the interest until he came here.

Q. About what times of the year did your interest fall due?

A. My impression is that it fell due on the 1st of January and July. By the terms of the mortgage the interest was payable at a different time; but by arrangement with him I paid the interest on the 1st of January, so that the interest would run from January to July.

Q. Then you mean you usually paid the interest somewhere about the 1st of January and July?

A. Yes?

Q. How much were you acquainted with Mrs. Sutton?

A. Well, very little. It was so far as this: I knew Mrs. Sutton when she was a child; I think she was Miss Miller; I knew her and her parents; but I saw very little of her until later years.

Q. From the time of her childhood days?

A. From the time she went out West—from the time she married Charles Sutton; Charles Sutton was a neighbor of mine, and then they disappeared, you may say, and I saw very little of them.

Q. Since her marriage you saw very little of her until when?

A. I cannot recall having seen Mrs. Sutton of late years until I saw her in the house when I called there on Mr. Kenyon after he was taken with this sickness.

Q. At his house where he died?

A. On the south side of 124th street.

Q. Where he died?

A. Yes.

(By consent the signature of the witness is waived.)

441 It is admitted that the books which have been the subject of evidence, upon which witnesses have been examined, and from which entries have been introduced in evidence, are in the handwriting of Mr. John S. Kenyon.

It is also admitted that the paper headed "Assets: Jan'y 1, 1882" —being Exhibit 1, June 1, 1883—is in the handwriting of Mr. John S. Kenyon.

CORNELIUS W. VAN VOORHIS, a witness called on behalf of the defendants, being duly sworn and examined, testifies as follows:

Direct examination by Mr. ERASTUS F. BROWN:

Q. Where do you reside?

A. At 31 West 127th street, New York city.

Q. What is your business?

A. I am a lawyer.

Q. Where is your office?

A. At 22 Duane street, in this city.

Q. Do you know the parties to this controversy—Sarah S. Sutton, complainant, and Erastus F. Brown and Francis A. Kenyon, defendants?

A. I know the defendants, and I know the plaintiff slightly.

Q. Did you know John S. Kenyon in his lifetime?

A. Very intimately. I have known him since 1830.

Q. You have been for some years counsel to the Harlem Savings Bank?

A. Ever since they have been a bank.

Q. Your acquaintance with Mr. Kenyon has been, to an extent, intimate?

A. Well, quite so; yes.

Q. Mr. Kenyon was at one time an officer of the bank, was he not?

A. He was our secretary.

442 Q. For what period of time, as near as you can approximate?

A. I think he was our secretary for about 15 years, and perhaps more. I would not be certain as to the exact time.

Q. He withdrew from the bank previous to his death?

A. No, sir; he resigned his secretaryship, but remained a member of the board of trustees.

Q. Are you connected with the board of trustees?

A. I am one of the board of trustees.

Q. Did you meet Mr. Kenyon at the meetings of the board?

A. Yes; and very frequently in the bank, at times, when the board did not meet. I was in the bank, on an average, three or four times a week.

Q. How was Mr. Kenyon engaged, if at all, in the bank, during the period that he was secretary?

A. He acted as our secretary, and, in the absence of the president, had the superintendence of the business of the bank.

Q. To any extent, did he take charge of the books?

A. Well, he was the principal man there after the president.

Q. During the time that he was secretary of the bank, please state what was his apparent condition of health.

A. Perfectly good—with the exception of the usual colds and little things of that kind that a person would naturally have.

Q. Have you met Mr. Kenyon on the street from time to time?

A. Very frequently.

Q. Please state whether accompanied or unaccompanied.

A. What do you mean by accompained?

Q. Whether he had any one with him or whether he was alone?

A. Generally alone. I do not know as I have ever met him—without it has been some Harlemer that has been with him—some personal acquaintance there. I have been with him myself and have

443 met Mr. Tappen and others; but if you mean any one having any supervision over him or anything of that kind, never.

Q. It has been testified here by a witness on the part of the complainant that during the years 1875, 1876, 1877, and 1879 the witness was at Oconomowoc, in the State of Wisconsin, during the summer months, ranging from the month of June up to September or October, and met Mr. Kenyon there; that she also met him from time to time when he was in New York, during the intervening periods, and that it appeared to her that his health was better in Oconomowoc than in New York city, but that in Oconomowoc, where his health, according to her observation, was better, he was in such a condition of health that while riding, frequently, he required to be helped into the wagon, and that she never knew an occasion there when his health was such that he walked over two street blocks of 200 feet. Now, what was your observation of Mr. Kenyon in that regard while he was in the city of New York.

Objected to on the ground that the question recites to this witness what another witness states. Also objected to because the specification is not correct.

A. Of course I knew nothing about Mr. Kenyon's state of health while he was absent from the city of New York, but during the whole of my acquaintance with him I did not know a man that I considered in better general health than John S. Kenyon; and as for walking, I have walked with him from my office, which used to be then down in 82 Nassau, up to the Bowery Bank, and I think he went at a very lively gait indeed, and had no difficulty in keeping up with me.

444 Q. From your observation of Mr. Kenyon during the years you have testified to, what was his condition of health as compared with a healthy man—apparently?

Objected to, and all further questions to this witness on this point objected to, because the counsel has indicated by his recital to the witness what testimony he desires.

Q. State, if you please, generally, independent of any questions

that have been put to you here to-day, what was John S. Kenyon's condition of health during the years that you have known him?

(Same objection.)

A. Well, now, sir, during the time that I have known Mr. Kenyon, even from the commencement of it (I believe he was engaged in working in a silversmith's shop then, on the corner of Burling Slip and Front street) I do not know a man among all my acquaintances whom I considered enjoyed better health in general than John S. Kenyon.

Q. Please state what is the distance between 82 Nassau street and the Bowery Bank, as near as you can approximate?

(Same objection.)

A. Well, I should thing is was about a mile. I never measured it; I would not like to be exact.

Q. Please state, if you know, whether Mr. Kenyon ever walked that distance and between those two places.

(Same objection.)

A. Yes, he did; he walked it with me.

445 Q. Your business is to a considerable extent devoted to real estate?

A. Almost exclusively.

Q. You are acquainted with the blocks—avenue and street—in the upper part of the city?

A. Yes.

Q. Can you give me the distance between the blocks between the Second and Third avenues?

A. Yes; between Second and Third avenue, 610 feet.

Q. And from there to Fifth avenue?

A. From Third to Lexington is 425 feet, from Lexington to Fourth avenue is 425 feet, from Fourth to Madison avenue is 425 feet, and from Madison to Fifth avenue is 420 feet.

Q. The street blocks are what length?

A. The street blocks are 200 feet, or, to be exact, the street blocks below 125th street are 201 feet 10 inches; and above that they are 199 feet 11 inches.

Q. You have heard the objection which has been taken to the question I asked you, where the testimony of another witness in the case has been detailed here to-day, have you?

A. Yes.

Q. Please state whether the answers to the subsequent questions, which you gave, were aided at all by any information given to you in, or derived from, the question presented to you which was objected to.

(Objected to.)

A. Not in the least.

Q. You could have answered the same even though the question objected to had not been asked?

Q. To any extent, did he take charge of the books?

A. Well, he was the principal man there after the president.

Q. During the time that he was secretary of the bank, please state what was his apparent condition of health.

A. Perfectly good—with the exception of the usual colds and little things of that kind that a person would naturally have.

Q. Have you met Mr. Kenyon on the street from time to time?

A. Very frequently.

Q. Please state whether accompanied or unaccompanied.

A. What do you mean by accompained?

Q. Whether he had any one with him or whether he was alone?

A. Generally alone. I do not know as I have ever met him—without it has been some Harlemer that has been with him—some personal acquaintance there. I have been with him myself and have

443 met Mr. Tappen and others; but if you mean any one having any supervision over him or anything of that kind, never.

Q. It has been testified here by a witness on the part of the complainant that during the years 1875, 1876, 1877, and 1879 the witness was at Oconomowoc, in the State of Wisconsin, during the summer months, ranging from the month of June up to September or October, and met Mr. Kenyon there; that she also met him from time to time when he was in New York, during the intervening periods, and that it appeared to her that his health was better in Oconomowoc than in New York city, but that in Oconomowoc, where his health, according to her observation, was better, he was in such a condition of health that while riding, frequently, he required to be helped into the wagon, and that she never knew an occasion there when his health was such that he walked over two street blocks of 200 feet. Now, what was your observation of Mr. Kenyon in that regard while he was in the city of New York.

Objected to on the ground that the question recites to this witness what another witness states. Also objected to because the specification is not correct.

A. Of course I knew nothing about Mr. Kenyon's state of health while he was absent from the city of New York, but during the whole of my acquaintance with him I did not know a man that I considered in better general health than John S. Kenyon; and as for walking, I have walked with him from my office, which used to be then down in 82 Nassau, up to the Bowery Bank, and I think he went at a very lively gait indeed, and had no difficulty in keeping up with me.

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Objected to, and all further questions to this witness on this point objected to, because the counsel has indicated by his recital to the witness what testimony he desires.

Q. State, if you please, generally, independent of any questions

that have been put to you here to-day, what was John S. Kenyon's condition of health during the years that you have known him?

(Same objection.)

A. Well, now, sir, during the time that I have known Mr. Kenyon, even from the commencement of it (I believe he was engaged in working in a silversmith's shop then, on the corner of Burling Slip and Front street) I do not know a man among all my acquaintances whom I considered enjoyed better health in general than John S. Kenyon.

Q. Please state what is the distance between 82 Nassau street and the Bowery Bank, as near as you can approximate?

(Same objection.)

A. Well, I should thing is was about a mile. I never measured it; I would not like to be exact.

Q. Please state, if you know, whether Mr. Kenyon ever walked that distance and between those two places.

(Same objection.)

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A. Yes.

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A. Yes; between Second and Third avenue, 610 feet.

Q. And from there to Fifth avenue?

A. From Third to Lexington is 425 feet, from Lexington to Fourth avenue is 425 feet, from Fourth to Madison avenue is 425 feet, and from Madison to Fifth avenue is 420 feet.

Q. The street blocks are what length?

A. The street blocks are 200 feet, or, to be exact, the street blocks below 125th street are 201 feet 10 inches; and above that they are 199 feet 11 inches.

Q. You have heard the objection which has been taken to the question I asked you, where the testimony of another witness in the case has been detailed here to-day, have you?

A. Yes.

Q. Please state whether the answers to the subsequent questions, which you gave, were aided at all by any information given to you in, or derived from, the question presented to you which was objected to.

(Objected to.)

A. Not in the least.

Q. You could have answered the same even though the question objected to had not been asked?

A. Undonbtedly.

Complainant's counsel moves to strike out all the evidence of this witness concerning the condition of Mr. Kenyon in his life-
446 time given in response to the question which recited testimony as having been heretofore given in the cause, and in response to all questions asked thereafter in the examination of this witness.

Q. Have you ever transacted business for John S. Kenyon?
A. Yes; several times, in relation to real estate.
Q. Please state the character of the business.

(Objected to as immaterial.)

A. Mr. Kenyon on several occasions consulted me about some leases he was about making—letting his houses—and also on several occasions as to some loans that he was about making; and I have also examined a title for him on a loan. He loaned $7,000 a short time previous to his death, and I examined the title of the property for him. He also consulted me very frequently as to property he had mortgages on. Property was declining somewhat, and he wanted my ideas of the value of the property he had these mortgages on.

Q. From your observation of Mr. Kenyon, based on these matters which you were attending to for him, what was his apparent condition of health as to ability to transact business?

(Same objection as before.)

A. His health was good; very good, I considered. I do not know among my acquaintances a more prudent, careful, sagacious man in relation to business than he was.

Q. How long did this continue?

A. It commenced probably some ten years ago, or a little over that, and it continued up to a recent period—I know the mortgage had not come from the record office, or it had not been delivered until after his death. I delivered it to the executors, I believe, or one of them.

447 Q. As to this business sagacity, &c., which you have just testified to, during what portion of this period of which you have been testifying now did it continue?

A. The whole of it. I did not know a director of the bank whose judgment was considered any better than Mr. Kenyon's.

Complainant's counsel here renews his motion to strike out all the evidence of this witness concerning the condition of Mr. Kenyon in his lifetime given in response to the question which recited testimony as having been heretofore given in the cause, and in response to all questions asked thereafter in the examination of this witness.

Complainant's counsel moves to strike out the evidence of this witness given subsequent to the motion last made by complainant's counsel as entered in the deposition, for the same reason that the last previous motion was made.

Cross-examination by Mr. WESTOVER:

Q. You are an attorney-at-law?

A. Yes.

Q. How often did you see Mr. Kenyon in the Savings Bank during the last three years of his life.

A. That is, 1879, 1880, and 1881; well, not near as frequently as I had previously, because he had resigned his secretaryship, but when he was in New York he generally attended our monthly meetings; also, he was a member of the finance committee, and he generally attended their meetings.

Q. How was his place filled when he was not in New York?

A. We generally appointed a secretary *pro tem.* I think I acted as that for a considerable time.

448 Q. In the years previous to 1879—going back to 1872——

THE WITNESS: Wait a moment; it may be you misunderstood my last answer. After he resigned we elected a new secretary. I mean that when Mr. Kenyon was absent, up to the time of his resigning as secretary, we appointed a secretary *pro tem.* After his resignation we elected another man.

Q. Then, if I now understand you correctly, while he was absent, from the years 1872 to about the time he resigned, his duties were performed by a secretary *pro tem.?*

A. If you will permit me to explain, there was very little duty for him to do, because when Mr. Kenyon would go away he would leave his signatures to all checks that we wanted to use, and if we wanted to use any more we would send him on those checks that we wanted him to sign; that is the way we got along without him.

Q. Is it a fact that very frequently for several years you sent little books of checks for him to sign at Oconomowoc and return?

A. I do not know where they were sent; I know they were sent somewhere.

Q. You did not send them?

A. No; I only know they were sent by hearsay.

Q. Those were small books with blank checks?

A. I never saw one of them.

Q. You saw the checks signed by him?

A. Yes.

Q. In what form they were sent to him for signature you do not know?

A. No; I was not present when they were sent.

Q. You know the fact that he used to leave what was thought sufficient to use during his absence?

A. Yes.

Q. Did the bank have what was called an annual meeting or semi-annual meeting?

449 A. We always have annual meetings on the second Tuesday of January, and we always have our monthly meetings on the second Tuesday of each month; and the finance committee

meets on an average once a week or two weeks, as occasion requires.

Q. What sort of meeting do the trustees or other officers of the bank hold of importance in the month of July more than ordinary months?

A. In the month of July we declare our dividend. The second Tuesday of every month we have our monthly meeting, and in the month of June sometimes we have two meetings; then, by law, the examining committee has to report, &c., from which we make up the amount of dividend we declare.

Q. Mr. Kenyon was in the habit of coming on from the West to attend that annual meeting in January, was he not?

A. Yes.

Q. And, many years, came on to attend the dividend meeting in July?

A. Yes; he generally did.

Q. Did you ever visit Mr. Kenyon at his house on 124th street since 1879?

A. No, sir; I think I left a note there about a loan he was making; I do not think I saw him.

Q. You did not see him there?

A. No, sir.

Q. But left word for him?

A. I left a written note for him.

Q. Were you, or are you, acquainted with Mrs. Sutton?

A. She was a Miss Miller, was she not?

Q. Yes.

A. I have seen her.

Q. Have you been acquainted with her any during the last eight or ten years?

A. Well, I was very well acquainted with her father, and I think I met her once or twice over at Mr. Charles M. Graham's.

Q. How long ago?

A. That must be over ten years ago. I knew her father, and
450 I think I knew, by sight, her two sisters; I think she had two sisters; but I had no personal acquaintance with her; I should not know her if I met her in the street, although I think she would me. I used to be very intimate with her father, and she no doubt has seen me very frequently.

Q. Did you know the habits of Mr. Kenyon while he lived?

A. Well, in what respect?

Q. His habits of eating and drinking, for instance?

A. Well, I always considered Mr. Kenyon a very temperate man.

Q. Was he a man addicted to the use of intoxicating drinks?

A. I think not; I never saw him drink in my life that I know of.

Q. Did you know him ever to take intoxicating drinks simply as a beverage?

A. I never did. We used to have an annual supper after our election, and I never knew Mr. Kenyon to take any even on those occasions.

Q. You regarded Mr. Kenyon, from your knowledge of him, as a remarkably careful and safe business man?

A. I did.

Q. A very prudent man?

A. Very prudent indeed. I do not know a man in the whole of Harlem who enjoyed a reputation for that very thing more than he did.

Q. He was a man of very good judgment?

A. Excellent.

Q. A man whose opinion in the matters of life were valuable?

A. He was always considered so.

Q. Was he a man pretty firm in his own opinion and conviction?

A. I think he was remarkably so.

Q. He was not a vacillating man?

A. No, sir; he made up his mind, and I don't think anything could change it.

451 Q. He was not a man easily influenced or controlled by others?

A. Not a particle. If Mr. Kenyon made up his mind I do not think all the persuasion and argument in the universe could change it. He was a very firm man.

Q. He was a man that knew his own business?

A. I think he did.

Q. And decided his own business for himself?

A. Yes.

Q. Yo do not think you could have wheedled him out of anything in particular?

A. Not a five-cent piece.

Q. No one could do it?

A. No, sir; no one could do it.

(By consent the signature of the witness is waived.)

EGAR F. BROWN, being recalled and further examined, testifies as follows:

Cross-examination resumed by Mr. WESTOVER:

Q. What is this book from which the item was read called Exhibit 5, June 1, 1883?

A. I believe it was the book in which Mr. Kenyon made his daily entries of expenses. I would call it a daily memorandum.

Q. A sort of diary?

A. A diary, yes.

Q. For the year 1881?

A. Yes.

Q. And this "Exhibit 1" that was read was found under date of Tuesday, November 8, of that year?

A. Yes.

Q. There are other items of expenditure in that book besides the one that was read?

A. Yes.

Q. They occur on every page or nearly every page of that book?
A. Yes; expenses and receipts of moneys.
Q. And the book is for the whole year 1881?
A. Yes.

452 (By consent the signature of the witness is waived.)

ERASTUS F. BROWN, one of the defendants, being duly called, sworn, and examined on behalf of the defendants, testifies as follows:

Direct examination by Mr. EDGAR K. BROWN:

Q. Where do you reside?
A. 307 East 124th street. I have resided there for the last 12 years.
Q. You are one of the defendants in this suit, and one of the executors of John S. Kenyon, deceased.
A. Yes.

Complainant's counsel objects to any further testimony from this witness under the statutes of the United States.

Q. What is your business?
A. I am an attorney and counselor of the supreme court of this State.
Q. Where is your place of business?
A. At 76 Nassau street, New York city.
Q. Are you acquainted with Sarah S. Sutton, the complainant in this action?
A. I am.
Q. And her husband, Charles T. Sutton?
A. Yes.
Q. How long have you been acquainted with them?
A. For many years.
Q. Did you know Mr. John S. Kenyon in his lifetime?
A. I did.
Q. How long did you know him?
A. Many years.
Q. What conversation did you have, if any, with Mrs. Sutton, or with Mr. Sutton in her presence, with reference to the place in Oconomowoc? If you had any, please state when and where and what it was.

Objected to, first, because the witness is incompetent; and, secondly, because the evidence is incompetent.

453 A. I had such a conversation in the early part of the month of February, 1882, at the house 308 East 124th street, in the front room of that house, at which time Mr. Charles T. Sutton, in the course of conversation with myself—and in which Mrs. Sutton took part—offered to purchase this property at Oconomowoc in controversy here.
Q. Did you have any further conversations with Mrs. Sutton, or with Mr. Sutton when Mrs. Sutton was present, subsequent to this time?

A. I had at a later period; I will state that I had several conversations with Mr. Sutton at my own house, 307 East 124th street, previous to a second conversation which I had with Mr. and Mrs. Sutton on the same subject at their own house.

Q. Please state that conversation.

A. I will state the conversation—I will state the conversation if you will take it as an answer to the question: "State the circumstances connected with it." This second conversation was on the day, as I recollect, that Mr. Sutton was about leaving for Oconomowoc; I was then at my own house, and Mr. Sutton called at the door to wish my sisters good-bye, and as I had been conversing with Mr. Sutton on another subject, I spoke on that other subject, and shortly after that—immediately after—Mr. Sutton returned to 308 East 124th street; I was then in my own back parlor, and the door-bell rang, and I went to the door, and a domestic, apparently, who was there, handed me a note; upon reading the note I immediately prepared myself, put on my shoes in place of slippers, and put on my overcoat and hat, and crossed over to 308 East 124th street; the door was opened by the same domestic, and I asked whether Mr. and Mrs. Sutton were in; she replied that Mrs. Sutton was upstairs engaged in packing, and Mr. Sutton, she thought, was downstairs; I said I
454 would go up; I went upstairs, and Mrs. Sutton was there engaged in packing. I said to Mrs. Sutton: "Sarah, I have received this note from Charles," and stated the contents to her, and I said: "Charles misunderstood me, clearly, when I spoke to him on the steps; I did not intend to say that I could not give him any information at present with regard to the place at Oconomowoc, but I was referring to the information which he desired with regard to hiring this house here for some friend whom he had mentioned." Thereupon Mrs. Sutton called Mr. Sutton, who was downstairs; he came up, and they were there together. I said to Mr. Sutton: "Charles, I got this note from you, and you misunderstand me; I did not intend to say that I have no information or satisfactory answer to give you in reference to the house at Oconomowoc, but what I said was applicable to this other inquiry you made." Mr. Sutton made a very slight reply; if I may say, without objection, my inference was that he was offended at what I said; that is the conversation.

Q. (Showing a paper to witness.) Look at this paper and state whether that is the note which you so received.

A. This is the note which I so received, and which is in the handwriting of Mr. Charles T. Sutton; I am acquainted with his handwriting; I have seen him write at my own house, where he signed papers in reference to pensions; the note is addressed on the back: "Mr. E. F. Brown, present."

The note referred to is offered in evidence by defendants' counsel.

It is objected to by complainant's counsel.

It is marked Exhibit 6, June 2, 1883.

The following is a copy:

455 "Mr. Brown.

"DEAR SIR: Owing to delay that seems probable I withdraw my offer for the place Ocon.

"Yours truly, C. T. SUTTON."

It is endorsed on the back: "Mr. E. F. Brown, present."

Q. Did you make any statement on the contents of this note?

A. I did, to Mrs. Sutton, as I have already testified, in the first place, and afterwards when Mr. Sutton arrived in the presence of Mrs. Sutton, when they were there together, I made the same statement, addressing my remarks the second time to Mr. Sutton—addressing him as Charles.

Q. That is all that took place at this conversation?

A. That is all, with the exception of the several conversations I have spoken of as having had in my own house with Chas. T. Sutton, which, of course, I cannot detail under exception.

Q. What was the first intimation you received in regard to this alleged claim of Sarah S. Sutton?

(Objected to as immaterial,)

A. The very first intimation I received was subsequent to the 10th day of May, 1882. Up to that time I had no suggestion—nothing of any kind or manner, notwithstanding my conversations—indicating any claim. Subsequent to May 10th, 1882, a gentlemen called at my office at 86 Nassau street, and asked whether Mr. Brown, the executor of John S. Kenyon, deceased, was in. I replied "I am the man." He then stepped up to me, and placed in my hands this paper, which is the demand by Mrs. Sutton—signed by her—that the executors should complete the building on the premises
456 in question, and, after having completed it, should transfer the title of it to her. This gentleman did not remain long enough for me to ask him the character of the paper, and I did not have any knowledge or information at the time as to whom the gentleman was. Subsequently—some days after—the same gentleman came to my office again, and I then learned that it was Mr. William E. White who had first called, and he asked me whether the executors had any answer to make to the demand which had been made upon them in the notice which had been served upon me by him. I merely stated that the executors could not comply with the demand. "The executors cannot comply with the demand" were my words. That was all that was said between us, except this: He then asked whether it was necessary for him to see the other executors. I said, "You may do as you desire on that subject, but the executors are of one mind on the question."

Q. This Mr. William E. White is the gentleman who has already testified here in this matter on the part of the complainant, is he not?

A. Yes.

(No cross-examination.)

Complainant's counsel moves that all the evidence of this witness

be stricken out for the reason that it is testifying to matters contrary to the statute.

(By consent the signature of the witness is waived.)

(Depositions closed.)

(Title of the cause.)

JUNE 27TH, 1883.

457 On application of defendants' counsel ordered that the taking of the testimony by the defendant of all his witnesses within this district be commenced before the examiner, at his office, in the city of Milwaukee, on Saturday, the 30th day of June inst., at 10 a. m., to be continued from day to day until concluded, unless upon cause shown.

Subpœna issued for defendants' witnesses as follows: George Vilas, Wm. H. Young, Albert Hoge, Carl Wichman, Jacob C. Van Horn, A. Simons, William K. Washburn, Hugo Lorleberg, F. Huebner, Wm. Besser, Otis Fay, C. H. Van Alstine, D. S. Chadwick, E. W. Barnard, H. C. Koch.

JUNE 30TH, 1883.

Marshal's return of the service of said order on plaintiff's attorney and of the service of said subpœna on the respective witnesses received and filed.

MILWAUKEE, *June 30th*, 1883—10 a. m.

Before the commissioner, at his office in the city of Milwaukee.

Present: Edwin Hurlbut, Esq., of counsel for plaintiff, and J. G. Jenkins, Esq., of counsel for defendants.

The defendants call as a witness EDWIN W. BARNARD, who, being duly sworn, testified:

I live in the town of Summit. I have lived there for about 37 years. I am a farmer.

(Witness shown paper.)

Q. Look at that paper, please.
A. Yes, sir.
Q. Did you in August, 1881, sell to John S. Kenyon a black mare?
A. Yes, sir.
Q. At what price?
A. $125.00.
Q. And received the money for it?
A. Yes, sir.
Q. Where is the mare now?

(Objected to.)

A. In Oconomowoc.
458 Q. In whose possession?
A. Mrs. Sutton's.

Q. Do you know who used that mare, and how it was used from the time you sold it?

(Objected to.)

A. It was used by a lady when I saw her, and bought for the purpose of being used by a lady.
Q. By whom?
A. Mrs. Sutton.

Plaintiff's counsel moves to strike out the whole of the foregoing testimony of this witness.

Cross-examined:

Q. Who spoke to you about this horse?
A. The first one that spoke to me about the horse was Coolidge Eastman, of Oconomowoc.
Q. Who else spoke to you about it?
A. I think Mrs. Williams.
Q. Mrs. Louisa Williams, of Oconomowoc?
A. Yes, sir.
Q. She has an office there as a notary?
A. Yes, sir.
Q. Who next spoke to you about it?
A. Mr. Kenyon, I think.
Q. Did Mrs. Sutton ever speak to you about it?
A. Not until after the horse was delivered at Oconomowoc, I think.
Q. You say the horse was bought for the purpose of being used by her?
A. Yes, sir
Q. Why do you say that he told you that?
A. Mr. Kenyon, when he came to me to purchase the horse, wanted to know if I could recommend the horse as being kind and gentle; it was for a lady; I asked no questions.
Q. That is all you know about it?
A. Yes, sir.

Re-examined:

Q. Where did you see Mr. Kenyon about the horse?
459 A. I cannot tell the exact locality, but I think in Oconomowoc.
Q. On the street?
A. Yes, sir; because I never was in their house but once; that was after the transfer.
Q. Was any one with Mr. Kenyon at the time?
A. I don't think there was.
Q. How long a conversation did you have with him on the subject?
A. Probably 10 or 15 minutes.

WILLIAM H. YOUNG, being sworn, testified:

I live in Oconomowoc and have for 30 years. I am in the wagon and carriage business. I am not doing much at it now. I followed that for several years.

(Shows witness paper.)

Q. Look at that if you please. Did you at any time and when sell to John S. Kenyon a lumber wagon—a one-horse lumber wagon?

(Objected to.)

A. Yes, sir.
Q. When was it?
A. Some time in the month of April; some time about the first of April they took it away.
Q. Mr. Kenyon died in January, 1882?
A. It was in the spring of 1882.
Q. You do not mean that?
A. He has been dead a little longer than I have been aware of; it was in the spring of 1881.

(Hands counsel letter.)

Q. At what price was it?
A. Forty dollars.
Q. Where was that lumber wagon delivered?
A. From my shop.
Q. Who took it away?
A. Mr. Sutton.
Q. This is a letter that you received from Mr. Kenyon when he was in New York?
A. Yes, sir; he had some talk with me about this wagon before he left.
460 Q. When was the talk about the wagon?
A. The talk with me about the wagon was the fall before he left the last time.
Q. That was the fall of 1881?
A. Yes, sir.
Q. You were right and I was wrong. Where was that talk?
A. In my shop in Oconomowoc.

(All this testimony objected to.)

Q. How long did this conversation last?
A. Not a great while, probably five minutes.
Q. And was he alone?
A. He was alone.
Q. Did he at that time contract for the wagon?
A. Not entirely; he said, "I will let you know." You will see by the letter he has.
Q. Is this letter which you have just handed me a letter you received from Mr. Kenyon after he went to New York?
A. Yes, sir.
Q. And which ordered the wagon?
A. Yes, sir; that is the letter I received from Mr. Kenyon.

This letter is offered in evidence by defendants' counsel, and is annexed and marked "Exhibit 1."

Q. Did you in pursuance of that letter build the wagon?

A. I commenced the wagon, and after his death I wrote to Mr. Sutton in regard to the wagon, whether I should go on and finish it.

(Hands counsel letter.)

Q. This letter you received from the plaintiff's husband who was then in New York?

A. Yes, sir.

Letter offered in evidence and annexed as "Exhibit 2."

(Objected to.)

Q. And you then completed the wagon?

A. I built the wagon according to Mr. Kenyon's directions.

Q. And after Mr. Kenyon's death?

A. Yes, sir.

461 Q. Did you then present a bill for that wagon against the estate of Mr. Kenyon?

A. I did.

Q. How did you come to do that?

A. Because I wanted my pay.

Q. At whose suggestion?

A. Not any one's.

Q. Did you receive your pay?

A. I did; yes, sir.

(Plaintiff moves to strike out all the testimony of this witness.)

(Cross-examination waived.)

OTIS FAY, being sworn, testified:

I reside in Oconomowoc, and have for 23 years.

Q. What is your business, and what was it in 1881?

A. Teamster.

Q. Did you know John S. Kenyon in his lifetime?

A. Yes, sir.

Q. Did you ever haul any sand or brick for him?

A. Yes, sir.

(Shows witness paper.)

Q. Won't you look at that bill and see if that refreshes yonr memory as to dates about when it was, what month?

A. Yes, sir; that is on the old house there.

Q. It was in the months of May and June?

A. Yes, sir.

Q. 1881?

A. Yes, sir.

Q. Where was the brick and sand hauled to?

A. Down there where Mr. Sutton lives on the Breck property.

Q. You mean on that property where Mr. and Mrs. Sutton are now?

A. Yes, sir.

Q. The Breck property?

A. Yes, sir.

Q. Where did you haul that brick from?
A. I guess I hauled it from the depot.
Q. Did you render this bill for the hauling to Mr. Kenyon?
A. Yes, sir.
462 Q. And were paid by him?
A. Yes, sir.
Q. That was in June, 1881, was it not?
A. Yes, sir.
Q. Where was Mr. Kenyon at the time?
A. That he paid me?
Q. Yes, sir.
A. I think I met him up town.
Q. Was he alone or was any one with him?
A. He was alone.
Q. Did you see him on or about that Breck property during that summer while you were hauling?
A. See him on the property? Yes, sir.
Q. What did you see him doing there?
A. He was down there walking around once in awhile while I was down there.
Q. How far is that Breck place from where Mr. and Mrs. Sutton formerly lived on Main street, opposite Dr. Miller's?
A. About a mile and a half, I guess.

Cross-examined:

Q. How much brick did you haul?
A. I just hauled two car-loads for some chimneys, and to build up the cellar wall.
Q. That was the repairing of the old cottage, was it not?
A. Yes, sir.
Q. That was on the place, the one that Breck built?
A. Yes, sir.
Q. It was to build the chimneys and some underpinning for that building?
A. Yes, sir.
Q. The other building was not meddled with then?
A. No, sir.
Q. Had not commenced meddling with it?
A. No, sir.
Q. Who else did you see there? Who seemed to be the boss around there?
463 (Objected to as immaterial and as not proper cross-examination.)
Q. Who seemed to be the managing man on the premises around?
(Objected to.)
A. Mr. Sutton.
Q. Did Mr. Sutton give you any directions about the hauling, or where to put the bricks?
A. He told me where to pile them.

Q. Mr. Sutton told you where to pile them?
A. Yes, sir.
Q. Did Mr. Kenyon say anything to you when you came with the brick?
A. He was not there when I came with the brick.
Q. Anybody there but Mr. Sutton that managed the affairs?
A. No, sir; not when I brought them brick.
Q. Who was the general manager there apparently around the premises; was not Mr. Sutton there managing it?

(Objected to.)

A. Yes, sir.
Q. What was Mr. Sutton doing there?
A. Painting the boat-house.
Q. What else did you see him do there?
A. I don't remember now; he was around the boat-house when I was hauling for that building.
Q. You don't know about the quantity of brick you hauled?
A. I could not say for certain. I think two car-loads.
Q. Did you ever haul any other brick?
A. Yes, sir, I hauled brick for the other building there.
Q. At whose request?
A. Mr. Sutton's.
Q. Who settled with you for it?
A. Mr. Sutton.
Q. Who was the man that controlled in the building and
464 managing of that new building while you was there?
A. I was working for Mr. Sutton on that building.
Q. Mr. Sutton settled with you?
A. Yes, sir.
Q. Paid you?
A. Yes, sir.

Re-examined:

Q. Did you make out a bill?
A. On that last?
Q. Yes, sir?
A. I don't think I did. He asked me when I got about half done to tell him Saturday night how much I had done so far, and I told him, and he paid me my money.
Q. When you got all through did you make out a bill?
A. I don't remember whether I made out a bill. I think I had it in an account book, and he looked it over and said it was all right.
Q. Where was you when he paid you the money?
A. About half-way between the barn and house when he settled up.
Q. When you hauled brick for that building was Mr. Kenyon around there?
A. Once in awhile I would see him there. He was not there when I first commenced.

Q. What did you see Mr. Kenyon doing?
A. Nothing; he would ride round and go off.
Q. Whom did he ride around with?
A. He walked around there; would come in a boat and walk around.
Q. Did you see him come in a boat?
A. Yes, sir.
Q. Who was he with?
A. Alone.
Q. How far is it by the lake from this place to Mr. Sutton's old place on Main street?
A. I could not tell you.
Q. Have you any idea?
A. I never went across that way.
Q. Half a mile, is it?
A. It is further than that.
Q. Between half a mile and a mile, do you think?
465 A. I could not tell for certain; all I know is by just looking across.
Q. Should you think it was a mile?
A. All of that.
Q. When was this you saw him walking about—when he came in a boat alone; how late in 1881, when you hauled the brick for the new house?
A. I could not tell.
Q. It was after June, 1881, after you hauled the brick for the old house?
A. Yes, sir.
Q. Can you tell how long after that it was?
A. I never saw him around there much when I was working on the new house.
Q. When was it you were hauling brick for that new house?
A. I could not tell.
Q. You hauled brick for the old house in June, 1881?
A. Yes, sir.
Q. Cannot you give us some idea when it was you hauled brick for the new house?
A. I can't remember now.
Q. It was between June and October, was not it, of that year?
A. I could not tell for sure.
Q. Was it that summer?
A. It was that summer.
Q. And after June, 1881?
A. Yes, sir.

Recross-examined:

Q. Did you do any other work for Mr. Sutton about those premises?
A. I hauled the sand, brick, and stone for that building.
Q. At whose request?
A. At Mr. Sutton's.

Q. And he settled with you for it?
A. He settled with me for it.
Q. Paid you?
A. He paid me; I made a bargain with him.

WILLIAM BESSER, called by defendants, being sworn, testified:

466 I have lived in Oconomowoc 28 years. I keep a saloon now.
Q. What did you do in 1881?
A. Teaming then, selling lime.
Q. Will you look at that document? (Shows witness paper.) Did you, in June and July, 1881, know John S. Kenyon?
A. Yes, sir.
Q. Did you, in those months, sell him any lime?
A. Mr. Sutton came and spoke to me when he wanted lime. I don't know that Mr. Kenyon ever told me to bring any lime.
Q. Did you make out a bill for the lime that Mr. Sutton ordered?
A. No, sir; my son made out the bill.
Q. You caused it to be made out?
A. Yes, sir.
Q. Did you cause it to be made out to Mr. Kenyon?
A. Yes, sir; I think it was made out to Mr. Kenyon; Mr. Sutton always paid me everything.
Q. It was made out to Mr. Kenyon?
A. Yes, sir.
Q. By whose direction was it made to Mr. Kenyon?
A. I don't know, unless by Mr. Sutton's. I always did the work for Mr. Sutton when he came for me.
Q. Where were you paid for the lime that you sold?
A. I believe he paid me down on the premises near the building.
Q. Who?
A. Mr. Sutton.
Q. Where was Mr. Kenyon?
A. I don't know; he was not there at the time. I gave Mr. Kenyon the bill, and he told me to go to Mr. Sutton.
Q. Did you see Mr. Kenyon about the premises?
A. Yes, sir.
Q. Where?
A. On the premises.
Q. Where else did you see him that summer?
A. In the village very often.
467 Q. What was he doing, either on the premises or around the village?
A. When I was on the premises he would be around there doing something; he always gave me orders about the lime.
Q. Who?
A. Mr. Sutton.
Q. I am talking about Mr. Kenyon.
A. He spoke to me sometimes—told me to bring lime.
Q. Where did you see Mr. Kenyon that summer?
A. Sometimes at the old house where they used to live.

Q. Where else?
A. I don't know as I ever seen him anywhere else.
Q. Did you see him on the Breck place?
A. Yes, sir.
Q. And at the village?
A. Yes, sir.
Q. What was he doing at the Breck place?
A. Looking around—walking.
Q. How did he come there?
A. I don't know whether in a boat or not.
Q. Was anybody with him?
A. No, sir; not when he was walking around, except the men around the building.
Q. When was he in the village?
A. He was alone most always when I saw him.

(Shows witness paper.)

Q. This is the bill you presented for the lime you sold?
A. Yes, sir; that is the bill; I know my son's writing.

The counsel for the defendant now produce the bill referred to by the witness, which the witness identifies as made by his son and signed by himself, and is endorsed "Besser bill, August 1st, $28.80." It is annexed, marked "Exhibit 3."

468 WITNESS: Mr. Sutton paid the bill; we made it out to Mr. Kenyon; Mr. Kenyon told me to go to Mr. Sutton, and Mr. Sutton paid it.

Cross-examined:

Q. That is the bill that Mr. Sutton paid?
A. Yes, sir; I showed it to Mr. Kenyon; he looked at it and told me to go to Mr. Sutton.
Q. And you went and got the pay?
A. Yes, sir.
Q. You never had any conversation with Mr. Kenyon about this work?
A. I showed Mr. Kenyon the bill; he looked at it and said, "Go to Mr. Sutton."
Q. I mean, in ordering the work, was it all ordered by Mr. Sutton?
A. Yes, sir; pretty much; once in a while Mr. Kenyon would tell me to bring some lime over.
Q. I understand you to say Mr. Sutton was the one that made the arrangement with you about brick and lime?
A. He was the one I gave the first lime to.
Q. He spoke to you in the first place?
A. Yes, sir.
Q. To furnish the lime for the building?
A. Yes, sir; I didn't furnish all the lime; some man over from Pewaukee furnished some.
Q. When you were hauling what was Mr. Sutton doing about the premises?

A. He was around there all the time with the men.
Q. Was he apparently the general manager of the work?
A. It looked as though he was.

(Objected to.)

WITNESS: He was managing man around there when I was there always.
Q. What did Mr. Kenyon do around there?
A. I never saw him doing anything only walking about there; I never saw him doing anything.

469 Re-examined:

[Q.] You state that Mr. Sutton ordered the lime; first what did Mr. Kenyon do?
A. When he ordered the lime?
Q. Did Mr. Kenyon talk to you about the lime?
A. He did once or twice speak to me about lime. I didn't draw it all at once; he spoke to me once or twice about it.

Recross-examined:

Q. Simply said they wanted some lime down there?
A. Yes, sir.
Q. Is that what he said when he spoke to you?
A. Yes, sir.

Re-examined:

Q. Where was it Mr. Kenyon spoke to you about it?
A. At his house on Main street.
Q. When he came to you and said he wanted some lime, when Mr. Kenyon came to you?
A. In the village.
Q. He met you on the street?
A. Yes, sir.
Q. He was alone?
A. Yes, sir; near the old place where he used to live.

Re-examined:

Q. When was it?
A. It was where he was living with Mr. Sutton, right on Main street.
Q. Near the residence of Mrs. Sutton?
A. Yes, sir.

E. S. CHADWICK, called by defendant, being sworn, testified:

Q. You live in Watertown, and have lived there how long?
A. I Have lived there 38 years.
Q. And your business?
A. Making brick.
Q. Will you be kind enough to look at that bill? (Shows witness paper.)
470 Q. Did you know John S. Kenyon in his lifetime?

A. I saw him once only.
Q. Where?
A. At my brick yard.
Q. In Watertown.
A. Yes, sir.
Q. Who was with him?
A. He was alone.
Q. What took place between you at that time, if anything, with reference to the purchase of brick?
A. He came and bought a car-load of brick.
Q. When was that?
A. On the 13th day of June, 1881.
Q. And did he pay you at that time for it?
A. I think he sent a draft either on Milwaukee or New York, I forget which. As soon as the brick arrived in Milwaukee it was unloaded.
Q. This is the bill which you made out to him for it?
A. Yes, sir.
Q. And is in your handwriting?
A. Yes, sir.

Defendants' counsel offer the bill in evidence, and it is hereto attached and marked "Exhibit 4."

It is conceded by the complainant that the endorsement on "Exhibit 4" is in the handwriting of Mr. John S. Kenyon.

Cross-examined:

[Q.] Were those all the brick you ever sold him?
A. I think it was. I think there was just one car-load of brick, 7,000 brick.

Re-examined:

Q. That was the only brick he purchased of you, one car-load?
A. That is all.
Q. How did he come there?
A. He came, I suppose, on the cars. I did not see him over 15 minutes.
Q. Do you know how he came to the yard?
A. On foot.
471 Q. How far is that from the depot?
A. About two-thirds of a mile.
Q. That is all the bill you ever had with him?
A. All I ever had.

JACOB C. VAN HORN, recalled on behalf of defendants:

Q. You have heretofore been examined in this case as a witness for the plaintiff?
A. Yes, sir.
Q. And in that examination did you not say that you had made a bargain with Mr. Sutton to do the lathing on that building on the Breck place?

A. Yes, sir.

Q. Will you be kind enough to look at that document? (Shows witness paper.) Is that a bill against the estate of John S. Kenyon for that lathing, accompanied with the affidavit made by you?

A. Yes, sir.

(Objected to. The paper itself is better evidence.)

Q. Did you swear to that before a notary public on the 25th day of July, 1882?

(Objected to.)

A. I did. I cannot remember the date?

Q. It appears here on the 25th day of July, 1882.

A. I ain't sure what date it was.

Q. Is this the bill for the lath about which you have previously testified?

A. Yes, sir.

Q. Have you received the amount of that bill from the estate of John S. Kenyon?

A. I have.

Q. And after the presentation of this bill?

A. Yes, sir.

Defendants' counsel offer this bill in evidence; it is hereto attached, and, by consent of counsel, a copy is taken instead of the original, which may remain in the hands of the executors, and the bill is as follows (marked "Exhibit 5"):

472 "John S. Kenyon's Estate to J. C. Van Horn, Dr.

"1881, Dec.	
"To lathing 1,913 yards, at 25 cts.	$47 82
"2 and one-half days' work, $2.00	5 00
	$52 82

"WAUKESHA COUNTY, *Wisconsin*, } ss:

"J. C. Van Horn, of the city of Oconomowoc, Wis., being duly sworn, doth depose and say: That the foregoing claim against the estate of John S. Kenyon, deceased, is justly due and owing to this deponent; that no payments have been made thereon, and that there are no offsets against the same to the knowledge of deponent.

"J. C. VAN HORN. [SEAL.]

"Subscribed and sworn to before me, this 25th day of July, 1882.

"LOUISA C. WILLIAMS, [SEAL.]
"*Notary Public.*"

Q. During that summer did you see John S. Kenyon—the summer of 1881?

A. Yes, sir.

Q. Frequently?

A. Quite frequently.

Q. Where did you see him?
A. On the ground there at the new building.
Q. Where else?
A. Walking around there; walking around the building.
Q. Where else?
A. I saw him in town, in the village, at his house, where Mrs. Sutton lived.
Q. Elsewhere in the village?
A. I met him occasionally on the street.
Q. What was Mr. Kenyon doing around the Breck place?
A. He was not doing anything, only walking around at his leisure.

Q. Examining the building, watching the thing as it went
473 along.

A. No; he didn't seem to have any particular interest in it.
Q. Did you ever see him boating?
A. Yes, sir; he came across the lake to the house.
Q. What distance is that?
A. I think three-fourths of a mile.
Q. Was he alone?
A. Sometimes he would come alone, and sometimes he would come with Mr. Sutton in the morning.
Q. And what was he doing about the village when you saw him?
A. Walking from the post office back to his home, I would meet him occasionally.
Q. Alone?
A. Yes, sir.

Cross-examined:

Q. I think you stated before when you were sworn that Mr. Sutton had the supervision of the work?
A. Yes, sir.
Q. Mr. Kenyon did not appear to take any charge of it or any interest in the progress of the work, or do anything around there as boss, or anything of that kind?

(Objected to.)

A. No; he did not.
Q. Did he seem to be managing the building, or taking charge as the superintendent there?
A. He did not; not at all.
Q. Mr. Sutton had the whole charge of it?
A. Yes, sir.

C. H. VAN ALSTINE, called by defense, being sworn, testified:

Q. You are one of the attorneys for the plaintiff in this case?
A. I am. I have resided in Oconomowoc for 11 years, and am an attorney-at-law.

474 Q. Were you in 1880 the agent of the Hartford Fire Insurance Company at Oconomowoc?
A. I was.
Q. Did you know John S. Kenyon in his lifetime?

A. I did.

Q. When did you first become acquainted with him?

A. I think in 1873.

Q. And you knew him from that time up to the time of his death?

A. I did.

Q. I now produce a policy in the Hartford Fire Insurance Company, No. 907, dated November 1st, 1880, and ask you if you, as agent of that company, issued that policy?

A. I did.

Q. I call your attention to certain writing in red ink across the face of the policy, and ask you if you signed that?

A. I did.

Q. At whose request did you issue that policy?

A. At the request of John S. Kenyon.

Q. Was it issued in your office—did he apply to you at your office?

A. Well, I could hardly tell. He used to be over there considerable, and he may have spoken to me some time when I was at Mrs. Sutton's house. I do not recollect of his coming to the office about it, but he spoke to me either at Mrs. Sutton's house or somewhere else in the city of Oconomowoc.

Q. Had he ever been at your office for anything of that kind?

A. I don't think he ever came up into the office.

Q. He has passed your office?

A. Yes, sir.

Q. Your office is how far from where he lived on Main street?

A. At that time it was about ten rods, in 1880, at the time this policy was issued; it was about ten rods from where Mrs. Sutton lived. At that time I was practicing law alone at my office in the city hall building in Oconomowoc.

Q. How often did you see Mr. Kenyon about the city of Oconomowoc in 1879, 1880, and 1881?

A. Oh, I saw him there very frequently, perhaps two or three times a week.

475 Q. What was he doing?

A. I have seen him walking to church; I have seen him sail on the lake in the summer time; I have seen him more frequently at Mrs. Sutton's residence at Oconomowoc, Wisconsin.

Q. Didn't you see him walking anywhere but to church in 1880 and 1881?

A. Oh, yes; I have seen him about the town walking.

Q. And when you speak of his sailing, do you mean rowing or sailing?

A. I have seen him do both rowing and sailing on the lake.

Q. Did you see him at this Breck place during the erection of the house?

A. I have seen him there a few times.

Q. What was he doing there?

A. He seemed to be simply there—not doing anything more than looking around.

Q. Do you know how he came there?

A. Sometimes he used to come there with a horse and carriage;

sometimes—well, I suppose he came on the lake, but I don't know about that—yes, I know; I went over with him once.

Q. In a boat?

A. Yes, sir.

Q. What was the distance, do you know, from Mr. Sutton's house on Main street to this new place on the lake?

A. I think about three-fourths of a mile.

Q. At these times, when you saw him at the Breck place, was he accompanied or alone?

A. I can hardly tell; Mr. Sutton, I think, was also there; I have seen him drive there several times with Mrs. Sutton and with Mr. Sutton—that is, I have seen them come into the driveway leading up to the house.

Q. Have you seen him there alone on the Breck place?

A. With no person there at all but himself?

476 Q. I mean, so far as he was concerned, as to persons accompanying him there?

A. Well, I don't know.

Q. When you went over with him from the house on Main street to the Breck place, who did the rowing?

A. We sailed over there.

Q. Who managed the boat?

A. I attended to the tacking—helped tack the boat; he did the sailing of the boat.

Q. He was captain of the schooner?

A. Yes, sir.

Q. When you saw him about the village was he alone or attended by any one?

A. I have seen him alone, and I have seen him more frequently with Mrs. Sutton.

Q. He was amusing himself about as any gentleman resorting to Oconomowoc in the summer amuses himself, was he not—fishing and sailing and riding?

A. Yes, sir; he would fish and ride and sail, but not to the excess that some people do.

Q. He was not intemperate in his amusements?

A. No, sir.

Q. He used to attend to business?

A. Yes, sir.

Q. You have talked to him on business, have you?

A. No, sir; I have not, excepting that business that I transacted for him, and that was only a very few times.

Q. This property is on the Breck place, so called?

A. I did not examine it (examines policy); yes, sir; this policy was issued upon the property known as the Breck place.

Defendants' counsel offer the policy in evidence to be annexed as "Exhibit 6."

Cross-examined:

477 Q. What buildings were in existence at the time that that policy was issued, and which that policy was meant to cover?

A. The old house.

Q. That is called the old cottage on the Breck place?

A. Yes, sir; and the barn that had been newly erected on the place; and the boat-house.

Q. The main building was not commenced at the time this policy was issued?

A. No; had not been commenced.

Q. What boat-house was this?

A. It was the boat-house that stood upon the bank of the lake at the northwest portion of the lands there.

Q. Who built it?

A. That I don't know.

Q. State what you do know about it, if anything?

A. I know the boat-house was there.

Q. Did you see anybody at work on it?

A. No.

Q. What was in the boat-house?

A. That I do not know.

Q. You did not examine?

A. I did not—not the inside of it.

Q. You have no knowledge as to who was the man that erected it?

A. I don't know of my own knowledge.

Q. You do not know whether Mr. Sutton worked on it and erected it or not?

A. Not of my own knowledge.

Q. What did you learn and from whom in relation to its being built; did you learn anything from Mr. Kenyon in relation to it?

A. I did not.

Q. You may state if you know—you say you have seen Mr. Kenyon walking around the streets—you may state what you know, if anything, about his health.

A. I know that he had spells when he was not well; I know that he complained of his head a good deal; I know that he kept out of the sun as much as he could; that is about all I do know.

478 Re-examined:

Q. Most people visiting Oconomowoc in the summer keep out of the sun, do they not?

A. No.

(Objected to.)

Q. How often were those spells—how frequent?

A. I could not tell that; I have heard him say, frequently, that he had staid in a good deal to-day because the sun was hot. I have heard him say he was not feeling well to-day several times. Those times that I remember better were in—perhaps in—the years 1878, 1879, and 1880.

Q. How often during those three years did you hear him say he staid in because the sun was hot?

A. I could not tell you; that would be guess work.

Q. Was it neuralgia in the head he complained of?

A. I don't think I ever heard him say what it was.

Q. And about how often should you say you had heard him complain during those three or four years—the last three or four years of his life?

A. Well, I don't know; I met him a good many times, but how many times I heard him complain I could not tell.

Q. It did not confine him to his bed?

A. He was confined to his bed, but for what reason I do not know.

Q. When was that?

A. Well, in 1878—it seems to me in the fall—he was quite sick; maybe it was 1879; I mean the time he was said to have had a stroke of paralysis.

Q. That was 1878?

A. I think it was that or 1879.

Q. When this endorsement was made on here in Sept., 1881, for a carpenter's risk on the barn, that was done at Mr. Kenyon's request, was it not?

A. No; I believe not; I think that endorsement was made at the request of Mr. Sutton; I am now sure it was, because Mr. Sutton paid me the $1.80.

479 Q. Mr. Sutton's mind was bright and active, and he was a careful, close business man, was he not?

A. I thought that he was.

Recross-examined:

Q. You may state what the understanding was, if you learned, as to the trouble with Mr. Kenyon's head?

(Objected to as far as asking the witness for understanding.)

Q. What was the general understanding by yourself and the friends, the intimate friends of Mr. Kenyon?

(Same objection.)

A. Well, I don't know what the general understanding was.

Q. So far as you do know, if you had any understanding?

A. I hadn't any at all.

H. C. Koch, called by defense, being sworn, testified:

I reside in the city of Milwaukee, and have so resided for 41 years. I am an architect, and have been for a good many years.

Q. And were such architect in 1881?

A. Yes, sir.

Q. Did you know John S. Kenyon in his lifetime?

A. Yes, sir.

Q. Did you have anything to do with him with reference to making plans for a new house he was to put up on what is known as the Breck place, in the city of Milwaukee? (Oconomowoc.)

A. Yes, sir; I made the plan—I never knew the name of the place it went to.

Q. Where did you first see Mr. Kenyon?

A. He called at my office in the spring of 1881.

Q. Any one with him?

A. No, sir; he came alone.

480 Q. What was the effect of the conversation—what was it about?

A. He came in with some sketches or pencil drawings that he had made, he and Mr. Sutton, or Mrs. Sutton, I don't know which; they wished to get working plans made for a dwelling to be erected near Oconomowoc, and I made a contract or agreement with him for a certain percentage I was to make those plans. We first made them as he requested, and kept increasing them, adding things to them, and he proceeded to get bids on them from contractors. Afterwards he told me he thought it would cost a little more than he intended to spend; he thought he would have to curtail it; but how much he did curtail it I don't know.

Q. How many times did you see Mr. Kenyon on the subject?

A. It seems to me six or eight times.

Q. Where did you see him?

A. At my office.

Q. He would come in from Oconomowoc to see you?

A. Yes, sir. I did see him sometimes in the street.

Q. In Milwaukee?

A. Yes, sir.

Q. What appeared to be his state of heath and ability to do business?

A. I don't think he was a very strong man, but he appeared quite well.

Q. Went around alone?

A. Yes, sir.

Q. Understood what he was talking about?

A. Yes, sir; he seemed to. I think once or twice Mr. Sutton was with him, but that was after the plans were nearly done. After they were nearly done and sent out to him to be examined then Mr. Sutton came in with him.

Q. You did not send the plans out until after July, 1881, did you?

A. No, sir; I believe not. They were sent back and forth several times.

Q. Did you finally send in the plans until after he had received proposals?

481 A. Yes, sir; they were sent after the proposals were all in, but they had been sent out before that.

Q. You finally sent them out after the proposals were all in?

[A.] ——.

Q. I call your attention to a letter you wrote on the 13th of August, and ask you if it was not after that?

A. Yes, sir; it was after this.

Q. Did you have anything more to do with it after you had sent those plans out finally?

A. No, sir. The agreement was if he wanted me he would request me to come out.

Cross-examined:

Q. Who made those sketches that Mr. Kenyon brought in?
A. That I don't know, but I think he told me Mr. Sutton made them.
Q. And you worked from those sketches in making your draft and plan?
A. Yes, sir; as to the size and the arrangements.
Q. And when you had completed them you sent them out and they revised and changed them as suited their convenience?
A. Yes, sir; I suppose so. There were changes suggested, and I made them for them.
Q. As changes were suggested?
A. Yes, sir.
Q. How often did Mr. Sutton come in with him?
A. I think at least twice—it might have been three times—and one time Mr. Sutton came alone, and I think he had a note from Mr. Kenyon. Mr. Kenyon did not come with him, and he told me about some changes to be made.
Q. Gave you some directions?
A. Yes, sir.
Q. Was Mrs. Sutton with Mr. Kenyon—this lady here?
A. I have seen the lady with him, but I do not know
482 whether it was in the office or not. They were in several times I understood from some of my clerks, and I was not there.
Q. And Mrs. Sutton was with him?
A. She might have been, but I don't remember. Once I distinctly remember I saw them come out of the coffee store; I spoke to him; he asked some questions; this lady was with him, and she walked along, and he stopped with me for a minute or two.

CHARLES WICHMAN, called by defense, being sworn, testified:

Q. You reside in the city of Oconomowoc?
A. Yes, sir.
Q. And you resided there in 1881?
A. Yes, sir.
Q. And are a carpenter?
A. Yes, sir.
Q. Did you do carpenter work on this house of Mr. Kenyon's, on the Breck place?
A. Yes, sir.

(Shows witness paper.)

Q. Please look at that document. Did you make and sign that affidavit?
A. No, I didn't make it at all.
Q. Is not that your handwriting?
A. No, sir; that is Mrs. Williams'.
Q. Look at that signature?
A. That is mine.

Q. You swore to that, didn't you?
A. Yes, sir.
Q. Did you present to the estate of John S. Kenyon after his death a claim of $12.50 for carpenter work for six and one-fourth days at two dollars a day, for this work on the Breck place?
A. I met Mr. Sutton once, and he told me I had better get a bill made out and give it to Mrs. Williams. I met Mrs. Williams on the street and told her how much it was, and she made out a bill.
Q. And you signed it?
A. Yes, sir.
Q. And you received this money from the estate of Mr. Kenyon?
A. Yes, sir.
483 Q. This $12.50?
A. Yes, sir; where that came from I don't know.

Defendants' counsel offers in evidence this statement. It is marked "Exhibit 7:"

"John S. Kenyon's Estate, to Charles Wichman, Dr.
"1881, Dec.
"To carpenter work, 6¼ days, at $2 ..... $12 50

"STATE OF WISCONSIN, } ss:
"*Waukesha County,* }

"Charles Wichman, of the city of Milwaukee (Oconomowoc), being duly sworn doth depose and say that the foregoing claim against the estate of John S. Kenyon, deceased, is justly due and owing to this deponent; that no payments have been made thereon, and that there are no offsets thereon to the knowledge of this deponent.
"CHARLES WICHMAN. [SEAL.]

"Subscribed and sworn to before me, this 25th day of July, 1882.
"_____ _____."

The introduction of the paper in evidence objected to, but no objection is made to the copy being attached instead of the original.

Q. Did you do any other work on that place except what is specified in that bill?
A. Yes, sir; I have been working for a good many years.
Q. On the Breck place?
A. Yes, sir; I have been working there too.
Q. Did you do any other carpenter work on the new house on the Breck place except what is specified in the bill?
A. Yes, sir; I worked on the old place. That is not for the new building at all. That is on the old building.
Q. Did you work on the new building?
A. Yes, sir.
484 Q. You were paid for it?
A. Yes, sir; by Mr. Sutton.
Q. Where were you paid for it—where did you get your pay?
A. Always in the house. Mr. Sutton hired me. I have been

acquainted with him for many years, and he told me he wanted me to go to work.

Q. Did Mr. Sutton always pay you?

A. Always. He paid everybody there, all the carpenters he had.

Q. Did Mr. Sutton always pay you?

A. Yes, sir.

Q. Did you know John S. Kenyon?

A. Yes, sir.

[Q.] ——?

A. He paid me—not on that place, at the time they lived on Main street?

Q. He paid you money on the Main-street house?

A. Yes, sir.

Q. When you were doing carpenter work on the Breck place was Mr. Kenyon around there?

A. Yes, sir.

(Objected to.)

Q. What was he doing around there?

A. Not anything; once in a while he picked up a nail, a piece of old wood that lies around.

Q. How did he get there?

A. Sometimes with a boat, most of the time with a boat.

Q. Anybody with him?

A. Sometimes; yes, sir.

Q. Sometimes he came alone?

[A.] ——.

Q. With a rowboat or sailboat?

A. If he has a rowboat he comes alone. It was a small boat he had to row himself. Sometimes he had company with a sailboat. They told me it was his sister, and sometimes Mrs. Sutton. I saw the whole family came over there.

Cross-examined.

Q. What was Mr. Sutton doing there? Bossing the whole business there?

485 (Objected to.)

A. It looked so to me.

Q. He hired the men and paid them?

A. Yes, sir; what I know, so much as I know about it.

Q. Was he at work around there?

A. Yes, sir; he worked all the time I was working. He never came without working.

Q. Do you know about his building the boat-house, working on it?

(Objected to as not proper cross-examination.)

A. Yes, sir; I worked on it myself, too; I helped him build it.

Q. He was at work on the boat-house?

A. Yes, sir; he told me how he wants it made.

(Defendants' counsel moves to strike out the answer.)

Q. Did Mr. Kenyon give you any orders about the work?

A. Not there.

Q. Then you received all your orders for work around there from Mr. Sutton?

A. Yes, sir.

Q. Mr. Sutton paid you all except this bill, I understand you?

A. That was for the old house. He paid me for all on the new building. I was doing something on the barn and Mr. Sutton paid me, and on the boat-house he paid me.

Q. Did he ever pay you anything for the work on the old house?

A. No, sir; Mr. Kenyon paid me that.

Re-examined:

Q. Did you make out bills when Mr. Sutton paid you?

A. No, sir; he paid every Saturday night.

Q. You made out no bills?

A. No, sir; we didn't need any bills. I made no bill except the bill you have here.

486 Recross-examined:

Q. Who paid you the money on that bill that you made out to Mrs. Williams?

A. Mrs. Williams paid me the money.

Q. That is all you know; you don't know where it came from; you say you made out a bill to Mrs. Williams and you got your money?

A. No, sir; I don't know where it came from; it may have come from New York for all I know.

Re-examined:

Q. How long after you made out that bill before you got the money?

A. Not a great while; I cannot remember exactly. I was waiting until Mr. Sutton and Mr. Kenyon should come back. Then I heard that Mr. Kenyon was dead, and so I spoke to Mr. Sutton about it.

Q. You gave this to Mrs. Williams in July, 1882. How long after that before you got the money?

A. Last fall, wasn't it?

F. HUEBNER, called by defense, being sworn, testified:

I live in Oconomowoc, and have lived there since 1879.

Q. In 1881 were you street commissioner of the city of Oconomowoc?

A. Yes, sir.

Q. Did you know John S. Kenyon in his lifetime?

A. Yes, sir; I was acquainted with him.

Q. I now produce and show to you two street commissioner's receipts for highway taxes on real estate in Oconomowoc for the year 1881, one of $2.50 and one of $1.00; one dated June 18th, 1881, and

the other September 16th, 1881. "Received of John S. Kenyon." Are those signed by you?

A. Yes, sir.

Q. And are they so far as they are written in your handwriting?

A. Yes, sir.

487 Q. I see there are two different dates there—what different taxes are those?

A. That is I suppose for the property on Main street. (Referring to the receipt of June 18th, 1881.)

(The question is objected to.)

(Plaintiff's counsel moves that the answer be stricken out.)

Q. What is the one of September 16th for?

(Objected to.)

A. I think for the Breck place.

(Motion to strike out the answer by plaintiff's counsel.)

Q. Who paid you these sums of money?

A. That is pretty hard to tell. I could not swear to it. I think Mr. Sutton did, but the property was assessed in Mr. Kenyon's name, and I had to draw the receipts in his name the way the rules read. I am pretty sure Mr. Sutton paid me, but I would not like to swear to it.

The receipts are offered in evidence and are hereto attached and marked respectively "Exhibit 8" & "Exhibit 9."

Cross-examined:

Q. You say you do not know who paid you that money?

A. I should not like to swear to it, but I think Mr. Sutton paid me. If I remember right I was up to the Breck place and Mr. Kenyon was not there, and Mr. Sutton asked me what I wished, and I told him the taxes were due on the Breck place. He thought I ought to collect the taxes of the party that owned just before; it was the fall it was bought; I told him he had to excuse me; I thought I ought to get it from them, and I think he paid it, and I had the receipts all made out, and he paid me and took the receipt.

488 Q. That was all there was of it?

A. Yes, sir; I would not swear he paid me, but I am very positive he paid me both taxes.

Q. You would not have given him the receipts unless he had paid you?

A. No, sir.

Re-examined:

Q. Did you know Mr. Kenyon?

A. Yes, sir.

Q. How long did you know him?

A. I think from 1873 or 1874; something like that.

Q. You went to this Breck place to find Mr. Kenyon?

A. No, sir; I went over there because I had other business that way, and I thought as I had the receipt I would see Mr. Kenyon or Mr. Sutton; there was no difference in the parties, you know.

Q. Did you see Mr. Kenyon frequently?

A. Yes, sir.

Q. Where?

A. Walking on the streets, going to the post office. I once kept a meat shop there, and he came up there once in a while, but very seldom. I have seen him walking up to the depot.

Q. How far is the depot from where he lived on Main street?

A. About half a mile; something like that.

Q. Where else did you see him?

A. I think once when I was on the Breck place; did I or not? I think I saw him there once kind of sitting around and looking on.

Q. Ever see him sailing or rowing?

A. No, sir; my business ain't around the lakes much, but I saw him riding with Mrs. Sutton in the buggy.

Q. Did you see him on the streets alone or with somebody?

A. I think he was generally with Mrs. Sutton.

Q. Ever see him alone?

489 A. Yes, sir; I think he generally went to the post office when the trains came in.

Recross-examined:

Q. You say you saw him frequently with Mrs. Sutton?

A. Yes, sir; riding in a buggy, and with Mr. Sutton riding in the wagon—saw him lots of times.

Q. Did you see him in company with Mr. Sutton or Mrs. Sutton oftener than you saw him alone?

A. Yes, sir.

Q. Did you see him very often alone?

A. No, not very often. I think the oftenest I saw the old gentleman was with Mrs. Sutton.

Q. Was he a strong, hearty man?

A. No, sir; very sick looking; and he told me once, I remember positively, in 1880; when I came to collect my sprinkling money, I asked for Mr. Kenyon at the kitchen door, and I saw Mr. Kenyon in the house; we were good friends, and we got to talking, and he asked me what I wanted, and I told him I had called for my sprinkling money, and he said I would have to wait and see Mr. Sutton; he fixes that. We got to talking about one thing and another, and he told me his health was very poor; he could not go out very much.

Q. That was in 1880?

A. Yes, sir.

Re-examined:

Q. What did he say was the matter with him?

A. He said, "My health is very poor just now; I can't go out much."

GEORGE VILAS, called by defense, being sworn, testified:

I live in Oconomowoc, and have lived there some 12 or 13 years.

Q. And what is your business?
A. Lumber dealer.

490 (Shows witness paper.)

Q. Did you know John S. Kenyon in his lifetime?
A. I did.
Q. Did you furnish lumber for the construction of the new house on what is called the Breck place?
A. Yes, sir.
Q. To what amount?
A. To the amount of the bill.
Q. $1,283.76?
A. Yes, sir.
Q. And did you receive $500 on account on the 21st of November, 1881, and $500 on account on the 13th of January, 1882?
A. Yes, sir.
Q. That $500 received in January, 1882, you received from New York, did you not?
A. Yes, sir.
Q. By draft from Mr. Kenyon?
A. Yes, sir.
Q. Received in a letter from Mr. Kenyon, was it?
A. Yes, sir.
Q. And did you present a bill for the balance of $283.76 against the estate of John S. Kenyon?
A. I did.
Q. That was in March, 1883, was it not?
A. It was in the spring—March, 1883.
Q. Have you received the amount of it from the estate of Mr. Kenyon?
A. I have not. My bill was not sent in at the time of the other bills. Mr. Sutton when he came back from New York came around and got the amount; said he was getting the amounts to send in; they would be paid; and I thought that would be all that would be necessary, till a long time afterwards I found it was necessary to make out a bill and have it sent in. I found the other dealers had done so a long time before; then I went to Mrs. Williams and done so, but have not received my pay yet.
Q. Did you receive from Mr. Kenyon a check to pay men employed on that house?

491 A. Yes, sir; I think I did—yes, sir; I remember the circumstance.

Q. Men who had worked on the house?
A. I suppose so.
Mr. HURLBUT: No, sir; what you know.
A. He sent me this money to pay bills to certain men there, and I do not know, I cannot remember, just the particulars about it; I think it was for that purpose, but I do not know.
Q. See if that memorandum at the foot of that bill indicates to you what it was; is that your handwriting?
A. No, sir.

Q. How long had you known Mr. Kenyon in his lifetime?
A. From the time he came there to Oconomowoc.
Q. Several years you had known him?
A. A number of years; I don't know exactly.
Q. Did you have any personal dealings with him in respect to this lumber furnished for this house?
A. I think Mr. Sutton made the arrangements for the lumber—the bargain for the lumber.
Q. And your bills were rendered to Mr. Kenyon?
A. The account was charged to Mr. Kenyon and paid by Mr. Kenyon.
Q. And did you see Mr. Kenyon frequently about Oconomowoc?
A. Yes, sir.
Q. What did you see him doing?
A. I used to meet him frequently on the streets and going to church here and there, as you would any man living in the same neighborhood.
Q. At the post office?
A. Oh, yes, sir; every place, almost.
Q. Walking and riding?
A. Yes, sir.
Q. Walking around the village alone?
A. Yes, sir; I met him alone often.
Q. See him ever rowing or sailing?
492 A. I don't know that I ever saw him; I was very little on the lakes myself.
Q. Did you see him at the Breck place?
A. I don't know that I ever saw him there; I was never there myself but a very few times; I don't know that I ever met him there.
Q. You saw him on the streets of Oconomowoc the same as you would any one?
A. Yes, sir.
Q. What was his apparent condition?
A. I think his health was not very good. He used to talk with me quite frequently about it, and he complained, especially at the time he was building the house, that his head troubled him.
Q. Headaches?
A. His head troubled him; the thing seemed to worry him; his health was not good.
Q. Complained of his head?
A. Yes, sir.
Q. Otherwise, seemed all right, did he?
A. Why, he seemed all right.
Q. But what the trouble was with his head you don't know?
A. No, sir; I don't know.

Cross-examined:

Q. You made no arrangements with Mr. Kenyon about this lumber personally?

A. No, sir. I think Mr. Sutton made all the arrangements and ordered the lumber.

Q. Did the whole business?

A. That is my impression.

Q. You answered that you received money to pay—you think you received money to pay workmen; will you explain that; did you pay the workmen?

A. Mr. Kenyon was owing me a small bill, and he wrote me a letter—I don't remember the date—enclosing a check to me, enough to pay my bill and also to pay certain other bills he was owing there, and he wrote in his letter who he was owing and sent this check, one check to me for the full amount, and requested me to pay these other bills, you understand.

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Q. What were those other bills?

A. I had forgotten all about the matter. I cannot now recollect who they were that I paid; I think there were some three or four or more small bills.

Q. Around the town?

A. Yes, sir. I think—it seems to me this was the winter before.

Q. Before they commenced building?

A. That letter would show. Yes, sir; that is my impression.

Q. You don't remember what they were?

A. I cannot recollect; no.

Q. Was it a large amount?

A. No, sir; small amounts. I guess some of them might have been $15 or $20—I cannot remember. It seems to me I paid Van Horn, and it seems to me——

Q. You can't tell who else you paid?

A. No, sir.

Q. Nor what the bills were?

A. No, sir.

Q. Nor for what the bills were for?

A. No, sir; I remember the circumstance.

Q. I will ask you as to the fact whether Mr. Kenyon was not a feeble, weakly man to all appearances?

A. Yes, sir; he seemed to be the last fall he was there. I never knew before but what he was enjoying good health, but at this time he complained to me about his health and the trouble with his head; before this time I never supposed but what he enjoyed good fair health.

Q. Did you see him ride around much alone?

A. I don't think I did.

Q. Was not it a fact that Mrs. Sutton was usually with him, or Mr. Sutton?

A. I think very likely; it is my impression that they were. I don't he was riding alone much.

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Q. As a matter of fact he was accompanied either by Mr. or Mrs. Sutton generally?

A. I think he was generally with them.

Q. And this continued during the time you were acquainted with him in Oconomowoc?

A. Yes, sir; he always lived with them. I saw him go to church with them. They were, of course, generally together—a good deal of the time at least. Of course I saw him alone at times.

Re-examined:

Q. This bill for lumber seems to have been rendered September, October, and November, 1881. You say Mr. Sutton ordered it—how did it come to be charged to Mr. Kenyon?

A. I supposed he was acting as agent for Mr. Kenyon.

Q. Did he tell you to charge it to Mr. Kenyon?

A. I don't remember there was anything said about it. I understood Mr. Kenyon was building the house, and I know Mr. Kenyon had also talked with me—I think him and Mr. Sutton talked with me together, but I understood that Mr. Kenyon's health was poor, and that Mr. Sutton was attending to the business, as I supposed, and I know that Mr. Kenyon came to see me before he went East in regard to the payment for the lumber, but Mr. Sutton made the bargain for the lumber and ordered lumber from time to time.

Q. Mr. Kenyon made the payments?

A. Mr. Kenyon paid me $500 before he went East, and sent me a check for $500 more from New York.

Recross-examined:

Q. You knew nothing about his acting as agent for Mr. Kenyon?

A. I don't think there was anything said. I don't think Mr. Sutton told me to charge it to Mr. Kenyon or the thing was
495 mentioned, but I charged it to Mr. Kenyon as I supposed that was right.

H. LORLEBERG, called by defense, being sworn, testified:

Q. You have been examined as a witness for the complainant before in this case?

A. Yes, sir.

Q. You reside in Oconomowoc?

A. Yes, sir.

Q. And your business is—

A. Hardware.

Q. You knew John S. Kenyon in his lifetime?

A. Yes, sir.

Q. You did quite a quantity of plumbing, did you not, in the house on Breck place?

A. Yes, sir.

Q. Did you render bills for the work you had done?

A. Yes, sir.

Q. How did you receive pay?

A. Mr. Sutton gave me a check—I think something over $200.

Q. Whose check?

A. If I remember right it was his own check. He gave me a check on the bank there; I think it was his own.

Q. You think it was Mr. Sutton's own check, do you?

A. I think so.

Q. What was the amount of that check?

A. I think it was somewhere about $200—it was a balance of money he had in the bank that he gave me before he went to New York.

Q. Did you receive any money sent to you from New York?

A. Yes, sir.

Q. From whom did you receive that?

A. John S. Kenyon,

Q. To whom did you make out the bills for the work you did?

A. John S. Kenyon, I think.

Q. Who ordered the work?

A. Mr. Sutton.

Q. How did you come to make the bills out to Mr. Kenyon?

A. I understood that Mr. Kenyon bought the property and began the account with Mr. Kenyon.

496 Q. Did Mr. Sutton tell you to begin the account with Mr. Kenyon?

A. Not as I know of, not that I recollect.

Q. Did send the account to Mr. Kenyon at New York?

A. Yes, sir.

Q. This bill of yours which is made out to Mr. Kenyon and is dated January 6th, 1882—did you send that bill to Mr. Kenyon at New York?

A. Yes, sir.

Q. There is an endorsement in Mr. Kenyon's handwriting "November 21st, check; January 12th, check, $200, and cash $5. Did he send you a check of $200 from New York on or about the 12th of January, 1882?

A. About two weeks before he died he sent me a check for the balance with the exception of $10, I think—the $10, or whatever the amount was, Mrs. Williams paid me. The reason he sent me the check less ten dollars I did not ask him. I thought he was coming home so soon I would not ask him. I paid some bill and sent to him. I thought he might have got it mixed.

Q. You made a claim against the estate of Mr. Kenyon for the balance?

A. Yes, sir.

Q. And gave it to Mrs. Williams and she forwarded it to New York?

A. Yes, sir.

Q. You received it from her afterwards?

A. She brought it to me at the store.

Q. How long did you know Mr. Kenyon?

A. Twelve years.

Q. How much did you see of him in Oconomowoc for the last few years of his life?

A. I met him probably every week two or three times.

Q. Where?

A. Frequently in my store—he was a good friend of mine—and at the house often.

Q. Whose house?

A. Mr. Sutton's house.

Q. He boarded with Mr. Sutton?

497 A. I suppose so; I did not know the arrangements.

Q. Did you see him at the postoffice?

A. I saw him go to the postoffice.

Q. See him about the village?

A. Yes, sir.

Q. Sailing and rowing on the lakes?

A. Saw him sailing once or twice.

Q. See him rowing?

A. No; I can't say I saw him rowing.

Q. Who was he with when you saw him sailing?

A. Mr. Sutton; I have been out with him several times myself.

Q. Who managed the boat when you were with him?

A. Mr. Sutton; I went out with Mr. Kenyon and Mr. Sutton.

Q. When you saw him about the village, and when he came into your store, was he alone or with anybody?

A. A great many times he was with Mr. Sutton, and then again he was alone.

Q. He seemed to be a man who understood what he was about?

A. Yes, sir.

Q. Did he appear to be ill at all?

A. He complained about his head several times.

Q. When was that, what year?

A. Just when he began the building—1880.

Q. Fall of 1880 or 1881? He died January, 1882.

A. It was just before he began the building—before the time he went at the plans.

Q. What was the trouble with his head—did he say?

A. No; he said his head pained him very much.

Q. How often did he tell you that?

A. Most particularly that one time, because he was very bad then. He told me several times he felt badly.

Q. What was this particular time?

A. At his house, he came to the door. He had told me to

498 get the plans of the building to make figures—estimates. He seemed to be very much troubled that day; he seemed to be mad that I had come for the plans. He seemed very nervous.

Q. He was dressed?

A. Yes, sir.

Cross-examined:

Q. I would ask whether or not it was a fact that Mr. Kenyon was rather in failing health?

A. Yes, sir; I should judge so.

Q. He was not what you would regard as a hearty, healthy man?

A. No, sir.

Q. Was it not a fact that as a general thing when he was out he was accompained either by Mr. or Mrs. Sutton?

A. Yes, sir.

Q. Did they not, either one or both of them, accompany him in his drives around the county as a general thing?
A. Yes, sir.

AMUND SIMONS, called by defense, being sworn, testifies:

Q. You live in Oconomowoc?
A. Yes, sir.
Q. You are a house and sign painter?
A. Yes, sir.
Q. Used to be of the firm of Simons & Rice?
A. Yes, sir.
Q. Did you know Mr. Kenyon in his lifetime?
A. Yes, sir.
Q. Did you do some work in painting this house on the Breck place?
A. Yes, sir.
Q. Did you make out bills for the work you did on the Breck place?
A. Yes, sir.
Q. To whom were they made out?
A. Mr. John S. Kenyon.
Q. How did you come to make them out to him? Who ordered the work?
499 A. Part of the work Mr. Kenyon told me to do, and part of the work Mr. Sutton ordered me to do.
Q. And who paid you?
A. Some bills Mr. Kenyon paid me, and some Mr. Sutton.
Q. Can you tell which of these three bills I have shown you Mr. Kenyon paid you?
A. I ain't positive; no, sir.
Q. Whether Mr. Sutton ordered the work, or Mr. Kenyon ordered the work, you made out the bills to Mr. Kenyon?
A. Mr. Sutton ordered me to do some work, and Mr. Kenyon.
Q. You made out the bills to Mr. Kenyon?
A. Yes, sir.
Q. Why did you make out the bills to Mr. Kenyon for the work Mr. Sutton ordered you to do?
A. Those are the bills I made out to Mr. Kenyon, the place—
Q. I say why did you make out a bill to Mr. Kenyon for the work Mr. Sutton ordered you to do?
A. I don't know—it was supposed to be Mr. Kenyon's place.
Q. After the death of Mr. Kenyon, and in July, 1882, did you make an affidavit as to the balance due you for work done on that place.
A. Yes, sir.
Q. And swear to it before Louise C. Williams, notary public?
A. I don't know if I swore to it.
Q. This is your handwriting and your signature?
A. Yes, sir.
Q. You made it out to present to Mr. Kenyon's estate?
A. Yes, sir.

Q. How did you come to do that?
A. I done the work over there.
Q. Who told you to go to Mrs. Williams?
A. She was attorney for that business; I gave it to her and told her to collect it.
500 Q. Did Mr. Sutton tell you to go there and have the bill sent against the estate?
A. Yes, sir.
Q. Did you receive the amount of that bill?
A. I did.
Q. From the estate?
A. Yes, sir.
Q. Did you see Mr. Kenyon in 1881?
A. I ain't positive I saw him.
Q. When you were painting this house and doing this work?
A. Yes, sir.
Q. Where did you see him?
A. I saw him over to the Breck place.
Q. Where else?
A. Around Mr. Sutton's.
Q. Where else?
A. He was down at the shop.
Q. Where is your shop with reference to where Mr. Sutton lived on Main street?
A. Not far from there. It is in Small's building. Four or five rods, I think.
Q. Where else did you see him?
A. On the street.
Q. What was he doing on the Breck place when you saw him there?
A. I didn't see him doing anything particularly.
Q. How did he come there?
A. Sometimes in a boat.
Q. Come in a boat alone?
A. Sometimes I seen him alone, and sometimes he was with Mr. Sutton.
Q. Did he come in a wagon?
A. Yes, sir.
Q. Sometimes alone?
A. I did not see him alone in a buggy.
Q. Did you see him alone in the street?
A. Yes, sir.
Q. He acted like anybody else?
A. Yes, sir.
Q. Did not see anything the matter with him, did you?
A. No that I know of, sir.
Q. Were you examined on the part of the plaintiff at Oconomowoc?
A. Yes, sir.

501 Cross-examined:

Q. Did you ever regard him as a healthy, robust man?

A. He did not seem so to me.

Re-examined:

Q. What was the matter with him?
A. I didn't ask.
Q. How did he seem?
A. He seemed to be kind of sickly.
Q. In what respect?
A. I could not tell.
Q. How old a man was he?
A. He must be over 60.
Q. Seemed to be growing old, didn't he?
A. Yes, sir.

ALBERT HOGE, called by defense, testified:

Q. Where do you reside?
A. Oconomowoc.
Q. How long have you resided there?
A. Nine years.
Q. What is your business?
A. Laborer.
Q. Did you know John S. Kenyon in his lifetime?
A. Yes, sir.
Q. I want you to look at that bill and those two affidavits made by you.

(Shows witness papers.)

Q. During the summer of 1881 were you employed about this Breck place?
A. Yes, sir.
Q. Before Mr. Kenyon went to New York, before the last time?
A. Yes, sir.
Q. In November, 1881, did Mr. Kenyon employ you to do anything?
A. He employed me ever since he bought that place there.
Q. What to do?
A. Labor, work.
Q. What took place between you and Mr. Kenyon in November, 1881, just about the time he went to New York?
502 A. He gave me the keys and told me to take charge of the place and see that everything was all right until he came back; he would make it all right when he came back.
Q. How long did you have those keys?
A. Until he got back. Do you mean the last time?
Q. Yes.
A. I had them until I believe it was the middle of March.
Q. And then what did you do with the keys?
A. Gave them to Mr. Sutton.
Q. That was after Mr. Kenyon's death?
A. Yes, sir.
Q. And in November, 1881, Mr. Kenyon gave you these keys and

said you should take care of the place when he was away, and he would make it all right when he came back?

A. Yes, sir.

Q. And you looked after the place after that until you gave up the keys to Mr. Sutton?

(Objected to and motion to strike out the question by plaintiff.)

A. Yes, sir.

Q. How long before Mr. Kenyon went to New York this last time was it he gave you these keys?

A. The day before he left.

Q. What did he say at that time, if anything, in regard to your keeping a good watch of the place while he was gone?

A. He said to keep a good, sharp watch at the place until he came back, and he would make it all right.

Q. Make it all right as to the pay?

A. Yes, sir.

Q. Did you make out and present to the estate of Mr. Kenyon in August, 1882, a bill for watching the place?

A. Yes, sir.

Q. Is that the bill, and is that the affidavit which you made?

A. That is mine; yes, sir.

503 Q. You swore to it before Louise C. Williams, notary public?

A. Yes, sir.

Q. How did you happen to make out that bill and go to Mrs. Williams?

A. Mr. Sutton told me whatever I had to send in, to go to Mrs. Williams.

Q. And did you receive from the estate afterwards the amount of your bill?

A. Yes, sir.

Bill offered in evidence by defense and is objected to by plaintiff, and by consent of counsel a copy is received instead of the original.

(Exhibit 10.)

John S. Kenyon's Estate to Albert Hoge, Dr.

November 7th, 1881, to 6 days' labor at $1.50 per day	$9 00
March 12th, to 4 months' care of house and grounds, from November 12th, 1881, to March 12th, 1882	60 00
Total	$69 00

STATE OF WISCONSIN, *County of Waukesha,* } ss:

Albert Hoge, being duly sworn, deposes and says that the above bill is just and true for services rendered to and for the said John S. Kenyon; that no part of the same has been paid, but is still due to deponent; and that there is no offset that your deponent is aware of.

ALBERT HOGE.

Subscribed and sworn to before me, this 1st day of August, 1882.
LOUISE C. WILLIAMS,
Notary Public.

Q. How did you come to make these two affidavits which I have shown you?

A. Mr. Kenyon told me he would make it all right, so I sent in the bills.

Q. These affidavits were made before Mrs. Williams, notary public.

A. Yes, sir.

504 Q. This six days' labor in November, 1881, at a dollar and a half a day; what work was that?

A. Cleaning around the house and inside the house.

Q. Was that after they had left?

A. Yes, sir.

Q. Did he tell you to do that work before he left?

A. Yes, sir.

Cross-examined:

Q. This 6 days' labor in November you have in your bill here, $1.50 per day; who employed you to do that work?

A. Mr. Kenyon.

Q. Mr. Kenyon himself, personally?

A. Yes, sir.

Q. Did not Mr. Sutton speak to you about the work?

A. Not that I recollect—not before they went to New York; but Mr. Sutton told me the same day, the same time that Mr. Kenyon told me to keep a sharp watch on the place.

Q. Were they together?

A. They were together.

Q. Where were you?

A. At the new building.

Q. How came they both to speak to you at the same time and tell you to keep a good, shap watch of the place?

A. Mr. Kenyon told me first, and then Mr. Sutton came at the same time out of the house; then Mr. Sutton told me too. Mr. Kenyon stood talking to me and telling me about it; then Mr. Sutton came out of the house and told me too.

Q. While Mr. Kenyon was still standing there?

A. Yes, sir.

Q. Who handed you the keys of that house?

A. Mr. Kenyon.

Q. Did Mr. Kenyon have the keys?

A. Yes, sir; he gave me the keys of the house.

Q. Did not Mr. Sutton give you the keys of the house?

A. No, sir; Mr. Kenyon gave me the keys when he left.

505 Q. Were you employed all the while there at the house during that four months?

A. Well, I was not all the time every day right there. Mr. Kenyon told me I would not need to be there all the time, just to look so that everything would be all right.

Q. All there was to do was simply for you to look around and see if everything was all right?

A. Except those six days there was lumber to pile up round there.

Q. How much lumber was there to pile up?

A. Not a great deal.

Q. How many days were you engaged in piling up that lumber?

A. I was cleaning that house there; that was during the six days.

Q. I mean on the four months' time, how steadily did you work during that four months—how many days' work did you do during that last four months?

A. I don't remember now.

Q. Were you there one day a week—did you go over once every week during that four months?

A. Yes, sir; and oftener.

Q. How often did you go?

A. I went mostly every evening after six.

Q. After you got done work sometimes you went over there and looked to see if it was all right?

A. Yes, sir.

Q. Was not that all you did during that four months—only just go over after six and take a look at it?

A. That is what Mr. Kenyon told me——

Q. Answer my question. Is not that all you did?

A. I don't understand.

Q. Answer my question; just answer yes or no.

(Question read.)

A. Yes.

Q. Was there a price agreed upon you were to be paid?

A. No, sir.

506 Q. You were at work for other people during that four months?

A. Yes, sir.

Q. And got your regular wages, did you not?

A. Yes, sir; certainly.

Q. Do you think you made out an honest bill when you charged that $60 for four months?

A. I think I did.

(Objected to as immaterial.)

Q. You have a little feeling toward Mr. Sutton, have you not?

A. No, sir.

Q. Didn't he tell you you made out a false bill?

A. No, sir. The justice of the peace wrote back that Mr. Sutton gave him advice; that is all I know about it?

Q. It was after that you made out other affidavits, was it not?

A. Yes, sir.

Q. After you made out this bill and sent it to New York, did you not receive notice that Mr. Sutton had given them advice that the bill was wrong?

A. That the bill was not so much?
Q. That the bill was not so much as you made it out?
A. Yes, sir.
Q. Then you made those other affidavits?
A. Yes, sir.
Q. You got up other affidavits to sustain your bill, didn't you?
A. I made an affidavit to send back again.
Q. Didn't you have a little feeling toward Mr. Sutton because he put you to that trouble?
A. No, sir.
Q. Did not you give Mr. Sutton the keys as soon as he returned from New York?
A. As soon as I seen him I gave him the keys; he came to me and wanted the keys, and I gave them to him.
Q. How came you to give him the keys if Mr. Kenyon gave them to you?

507 A. As soon as Mr. Sutton came I gave him the keys. I knew Mr. Kenyon was dead, and I knew Mr. Sutton wanted them as soon as he was home.

Q. What time did you give him the keys?
A. I don't recollect.
Q. Did you have charge of the property any after you gave Mr. Sutton the keys?
A. No, sir.
Q. Then you swear that Mr. Sutton did not give you the keys when Mr. Kenyon and he were together?
A. No, sir; Mr. Kenyon gave me the keys.

The defendants offer in evidence certified copy deed, John S. Kenyon to Sarah S. Sutton, dated July 1st, 1874, of lot 10, in the village of Oconomowoc. Acknowledged July 17th, 1874, and recorded in vol. 59 of Deeds, pages 170 and 171.

(Objected to by plaintiff's counsel for the reason it is not material.)

Marked "Exhibit 11" and hereto attached.

Defendant's counsel offers also a deed, James C. Hitchcock to John S. Kenyon, of the same premises, dated 28 April, 1874, and recorded in vol. 48 Deeds, page 155, in the office of the register of deeds of Waukesha county.

(Objected to for the same reason.)

Marked "Exhibit 12" and hereto attached.

Also a deed of the heirs of Samuel Breck, deceased, to John S. Kenyon, dated 23d of September, 1880, of the Breck property in question, acknowledged 28th of September, 1880, and recorded October 4th, 1880, in vol. 56 of Deeds, page 97.

Marked "Exhibit 13" and hereto attached.

508 Also the policy of insurance in the Insurance Company of North America, dated November 2d, 1881, for three years, to

John S. Kenyon, upon the Breck property, spoken of by Mrs. Louisa C. Williams in her testimony on behalf of the plaintiff.

Marked "Exhibit 14" and hereto attached.

Counsel for defendants now produces and offers in evidence a bill and order made out to John S. Kenyon by W. K. Washburn, a witness who was examined on behalf of the plaintiffs, and they are annexed, marked "Exhibit 15" and "Exhibit 16."

Counsel for plaintiff admits that these papers are in the handwriting of the witness, W. K. Washburn, but objects to the materiality of the testimony.

(Adjourned to September 1st, 1883.)

EXHIBIT 1.

No. 308 EAST 124 STREET, NEW YORK CITY, *Jan'y 16th*, '82.

Mr. Young.

DEAR SIR: I wish you would bill for me a single horse wagon such as I talked with you about before I left Cooney, and as good a one as you can for $40 *dollars*, and have it done on first of April; I want it about like Geo. Shufeldt, 2½ in. skein and with square box; also bottom and sides suitable for hauling gravel or manure, and painted anything but red. Let me know if you will build it.

Yours, &c., JOHN S. KENYON.

509 I would like it so that I can haul a boat to go fishing.

Exhibit 1, Fr. Bloodgood, examiner.

EXHIBIT 2.

308 EAST 124 STREET, NEW YORK, *Feb.* 9, '82.

Mr. William Young.

DEAR SIR: Some time before Mr. Kenyon's death he said to me he had ordered a wagon built by you—a one-horse sort of handy farm wagon. If he gave you the order please have it completed by April 1st or about that date. I shall probably be in Oconomowoc by that time.

Write me if Mr. K. ordered on receipt of this, and oblige

C. T. SUTTON.

Exhibit 2, Fr. Bloodgood, examiner.

EXHIBIT 3.

OCONOMOWOC, *July 25th*, 1881.

Mr. Kinien to Wm. Besser, Dr.

May 20.	To 10	bu.	lime	@	35c	$3 50
24.	" 10	"	"	"	"	3 50
June 15.	" 5	"	"	"	"	1 75
20.	" 7	"	"	"	"	2 45
23.	" 8	"	"	"	"	2 80
23.	" 2	"	hair	"	30c	60

	24.	" 10 "	lime "	35c		3 50
	24.	" 2 "	hair "	30c		60
	29.	" 10 "	lime "	35c		3 50
	29.	" 1 "	hair "	30c		30
July	9.	" 15 "	lime "	35c		5 25
510	22.	" 2 "	" " "			70
						$28 45
			1 bu. lime			35
						$28 80

Rec'd paym't,

W. BESSER.

(Endorsed: "Besser bill. Aug. 1. $28.80. Paid.")

Exhibit 2, Fr. Bloodgood, examiner.

EXHIBIT 4.

John S. Kenyon, Esq., to D. S. Chadwick, Dr.

1881.		
June 13th.	To 3,500 selected brick @ $6.00	$21 00
	" 3,500 common chimney brick @ $5.00	17 50
		$38 50

Received payment,

D. S. CHADWICK.

(Endorsed:) D. S. Chadwick. Bill of brick. Paid $38.50 June 13, '81.

Exhibit 4, Fr. Bloodgood, examiner.

Dollars, 1,000.00. Number 907.

The Hartford Fire Insurance Company. Incorporated 1810.
Charter Perpetual. Hartford, Conn.

511 By this policy of insurance, in consideration of the receipt of ten dollars and of the agreement and conditions herein contained, do insure John S. Kenyon to the amount of one thousand dollars, as follows:

Six hundred dollars on his frame shingle-roof dwelling-house, occupied or unoccupied; three hundred dollars on his frame shingle-roof barn, occupied or unoccupied; and one hundred dollars on his frame shingle-roof boat-house, occupied or unoccupied, said dwelling-house, barn, and boat-house being situated on the south bank of La Belle lake, and next west of the north and south quarter line of section 32, of the town of Oconomowoc, Wisconsin:

1. Against all such immediate loss or damage sustained by the assured as may occur by fire to the property above specified, not exceeding the sum insured nor the interest of the insured in the property, except

as hereinafter provided, from the first day of November, eighteen hundred and eighty, at twelve o'clock noon, to the first day of November, eighteen hundred and eighty-three, at 12 o'clock noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire, which shall in no case exceed what it would then cost to replace the same, deducting therefrom a suitable amount for any depreciation of such property from use or otherwise; and to be paid to the assured or his legal representatives sixty days after the notice and satisfactory proofs of the same are made by the assured and received at their office in Chicago, in accordance with the terms of this policy hereinafter mentioned; and this company shall not be liable until the actual payment of the premium, nor for loss by theft at or after a fire, nor for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power; nor for any loss by fire where such fire is occasioned by the fall of any building insured, or of any
512 building containing the property insured, or any part of such buildings; nor for any consequential or constructive damages to any building beyond what it would cost to repair or replace the same, whether such damage result from municipal ordinances or laws regulating or prohibiting the reconstruction or repairs of buildings, or otherwise, &c.

This policy is made and accepted on the above express conditions, but shall not be valid unless countersigned by the duly authorized agent of the Hartford Fire Insurance Company at Oconomowoc, Wisconsin.

In witness whereof the said Hartford Fire Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford and State of Connecticut.

GEO. L. CHASE, *President.*

J. D. BROWNE, *Secretary.*

Countersigned at Oconomowoc, Wis., this 1st day of November, 1880.

C. H. VAN ALSTINE, *Agent.*

Said policy endorsed as follows: "In consideration of one and $\frac{80}{100}$ dollars extra premium, thirty days' permission is given to use the barn insured under this policy to do carpenter work in. Dated Sept. 15th, 1881. C. H. Van Alstine, agent."

Exhibit 6. Fr. Bloodgood, examiner.

EXHIBIT 8.

STREET COMMISSIONER'S OFFICE,
OCONOMOWOC, WIS., *June* 18, 1881.

Received of J. S. Kenyon two $\frac{50}{100}$ dollars in full for highway taxes and fees on real estate and personal property in the city of Oconomowoc, for the year 1881, as appears on the highway tax-roll for said year.

Real estate: Valuation of, 2,500; tax, $2.50.
Personal property: Valuation of, —; tax, —.

F. HUEBNER,
Street Commissioner.

Endorsed: Taxes 1881. Oconomowoc, Breck, paid $2.50.

Exhibit 8. Fr. Bloodgood, examiner.

513 EXHIBIT 9.

STREET COMMISSIONER'S OFFICE,
OCONOMOWOC, WIS., *Sept.* 16, 1881.

Received of John Kenyon one dollar in full for highway taxes and fees of real estate and personal property, in the city of Oconomowoc, for the year 1881, as appears on the highway tax-roll for said year.

Real estate, valuation of, —; tax, $——.
Personal property, valuation of, 1,000; tax, $100.

F. HUEBNER,
Street Commissioner.

Endorsed: Tax bill 1881. Oconomowoc. $1.00. Paid Nov. 21. Exhibit 9. Fr. Bloodgood, examiner.

EXHIBIT 11.

STATE OF WISCONSIN, } ss:
Register's Office, Waukesha County, }

I, Andrew McKee, register of deeds of said county, hereby certify that the annexed copy of warranty deed has been by me compared with the original thereof as recorded in vol. 59 of deeds, on pages 170 and 171, and that the same is a correct transcript of such original record and of the whole thereof.

Witness my hand and official seal this 24th day of July, A. D. 1882.

ANDREW McKEE,
Register of Deeds,
By W. H. STEPHENS, *Deputy.*

Exhibit 11. Fr. Bloodgood, examiner.

Warranty Deed.

John S. Kenyon to Sarah S. Sutton.

This indenture, made the first day of July, in the year of
514 our Lord one thousand eight hundred and seventy-four, between John S. Kenyon, of the city and county of New York and State of New York, party of the first part, and Sarah S. Sutton, now of Oconomowoc, in the State of Wisconsin, party of the second part:

Witnesseth that the said party of the first part, for and in consideration of the sum of two thousand dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby con-

fessed and acknowledged, has given, granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part, her heirs and assigns forever, lot No. 70, in the village of Oconomowoc, Waukesha county, State of Wisconsin.

Together with all and singular the hereditaments thereunto belonging or in any wise appertaining, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, either in possession or expectancy of, in and to the above-bargained premises, and their hereditaments and appurtenances.

To have and to hold the said premises as above described, and the hereditaments and appurtenances unto the said party of the second part, and to her heirs and assigns forever.

And the said John S. Kenyon, for his heirs, executors, and administrators, does covenant, bargain, and agree, to and with the said party of the second part, her heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above described as of a good, sure, perfect, absolute, and indefeasable estate of inheritance in the law in fee-simple, and that the same are free and clear from incumbrances whatever, and
515 that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all and every person or persons lawfully claiming the whole or any part thereof he will forever warrant and defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN S. KENYON. [SEAL.]

Signed, sealed, and delivered in presence of—
SAMUEL B. GOODENOUGH.
HENRY PATTERSON.

STATE OF NEW YORK,
County of New York, } ss:

Be it remembered that on this 17th day of July, A. D. 1874, personally came before me the above-named John S. Kenyon, to me known to be the person who executed the above deed, and acknowledged the same to be his free act and deed for the uses and purposes therein mentioned.

[N. S.] W. W. DAVIS,
Notary Public, City and County of New York.

STATE OF NEW YORK,
City and County of New York, } ss:

I, William Walsh, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that W. W. Davis, whose name is subscribed to the certificate of the proof or acknowl-

edgement of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgement, a notary
516 public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same, and further that I am well acquainted with the handwriting of the said notary, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

I further certify that said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county, the 20th day of July, 1874.

[SEAL.] WILLIAM WALSH, *Clerk.*

Recorded at 6 o'clock p. m., this 26th day of January, 1882.

(Endorsed: John S. Kenyon to Sarah S. Sutton. Certified copy warranty deed.) Exhibit 11.

EXHIBIT 12.

STATE OF WISCONSIN, } ss:
Register's Office, Waukesha County, }

I, Andrew McKee, register of deeds of said county, hereby certify that the annexed copy of warranty deed has been by me compared with the original thereof as recorded in vol. 48 of deeds on page 155, and that the same is a correct transcript of such original record and of the whole thereof.

Witness my hand and official seal, this 22d day of July, A. D. 1882.

ANDREW McKEE, [SEAL.]
Register of Deeds.
By W. H. STEPHENS, *Deputy.*

Exhibit 12. Fr. Bloodgood, examiner.

517 No. 35—Warranty deed. James Hitchcock to John S. Kenyon.

This indenture, made the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy-four, between James C. Hitchcock and Leonora E., his wife, parties of the first part, and John S. Kenyon, party of the second part:

Witnesseth that the said party of the first part, for and in consideration of the sum of twenty-six hundred and fifty dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever, lot number seventy (70) in the village of Oconomowoc, county of Waukesha, State of Wisconsin.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part, either in law or equity, either in possession or expectancy of, in, and to the above-bargained premises and their hereditaments and appurtenances.

To have and to hold the said premises as above described with the hereditaments and appurtenances unto the said party of the second part and to his heirs and assigns forever.

And the said James C. Hitchcock, for himself and his heirs, executors, and administrators, does covenant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these pres-
518 ents he is well seized of the premises above described, as of a good, sure, perfect, absolute, and indefeasable estate of inheritance in the law in fee-simple, and that the same are free and clear from all incumbrances whatever, and that the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming the whole or any part thereof they will forever warrant and defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

J. C. HITCHCOCK. [SEAL.]
L. E. HITCHCOCK. [SEAL.]

Signed, sealed, and delivered in presence of—
GEORGE F. WESTOVER.
J. HENRY WESTOVER.

STATE OF WISCONSIN, } ss:
County of Waukesha, }

Be it remembered that on the twenty-seventh day of April, A. D. 1874, personally came before me the above-named James C. Hitchcock and Lenora E. Hitchcock, to me known to be the persons who executed the above deed, and acknowledged the same to be their free act and deed for the uses and purposes therein mentioned.

GEORGE F. WESTOVER,
Notary Public.

Received for record at 2 o'clock p. m., May 14th, 1874.

———— ————, *Register.*

(Endorsed: Certified copy. James C. Hitchcock to John S. Kenyon. Warranty deed.) Exhibit 12.

EXHIBIT 13.

STATE OF WISCONSIN, } ss:
Register's Office, Waukesha County, }

519 I, Andrew McKee, register of deeds of said county, hereby

certify that the annexed copy of warranty deed has been by me compared with the original thereof as recorded in vol. 56 of deeds, on page 97, and that the same is a correct transcript of such original record and of the whole thereof.

Witness my hand and seal, this 22d day of July, A. D. 1882.

[SEAL.] ANDREW McKEE,
Register of Deeds,
By W. H. STEPHENS,
Deputy.

Exhibit 13. Fr. Bloodgood, examiner.

Warranty Deed.

Jane Breck *et al* to John S. Kenyon.

This indenture, made this twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty, between Jane Breck, widow and sole legatee of Samuel Breck, late of Duchess county, New York, deceased, and Mary Morrison, Josephine Ackley, Anna Elderkin, Catherine Lardner, Agnes Miller, Lloyd Breck, and Helen, his wife, being the only children and sole heirs-at-law, with said widow of said Samuel Breck, deceased, as aforesaid, said widow and said Agnes Miller, Lloyd Breck, and wife, residing in Duchess county, New York, said Mary Morrison residing in Dane county, Wisconsin, and said Josephine Ackley; Anna Elderkin, and Catherine Lardner, residing in Oconomowoc, Wis., parties of the first part, and John S. Kenyon party of the second part:

Witnesseth that the said parties of the first part, for and in consideration of the sum of twenty-three hundred dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, remise,
520 release, alien, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever, the following described real estate situated in the county of Waukesha and State of Wisconsin, and being in the city of Oconomowoc, in said county and State, and is more fully described as follows:

Commencing in the center of the highway heretofore known as the Milwaukee and Watertown plank road, at a point where the north and south quarter line of section numbered 32 of town numbered 8, north of range numbered 17 east, in said county and State, crosses the said highway, and witnessed by "Sugar Maple," 3 in S. 9½ E. 44 links, and by another sugar maple 3 in. S. 83 deg. W. 95 links, and by cherry 9 in. N. 76¼ deg. E. 228½ links. Thence from said point thus witnessed north at variation of 5 deg. 55 min. east, so as to strike at about 10 links west of a hickory about six inches, thence on same course twenty-one chains and ten links (21,10) to the bank of La Belle lake, about eight links west of an elm stump thirty in. in diameter, said line supposed to be the north and south quarter

line of said section numbered 32 aforesaid, thence west in measurement five (5) chains (but the land hereby conveyed to be bounded by La Belle lake), thence about S. 8 deg. W. along the bank of La. Belle lake to a black oak marked by an axe only, thence S. about 3½ (three and one-half degrees) east about ten chains to center of said highway, (which center is witnessed by a hickory 5 in. N. 76½ deg. E. 101 links, and by sugar maple 3 in. S. 11½ deg. E. 57 links) thence south 61½ deg. east in center of said highway six chains and twelve links to place of beginning, containing eleven 1–7 acres of land more or less.

Excepting and reserving therefrom the following piece or parcel of land conveyed by said Samuel Breck and wife to Jacob John-
521 son by deed dated November 1st, 1869, and recorded in register of deeds' office for Waukesha county, Wis., in vol. 49 of deeds, page 420, described as follows: A parcel of land in the east half of the west half of sec. No. 32, town 8 north, range 17 east, in said Waukesha county, Wisconsin, commencing in the centre of the highway heretofore known as the plank road, and two rods west of the north and south ¼ line of said section, thence north parallel with said quarter line four and 88-100 chains, measured perpendicularly from and to the centre line of said highway; thence N. 60 and ⅔° west parallel to said highway 6 and 37-100 chains to the west line of the first above-described lands; thence S. 3 and ½° E. to centre of said highway; thence S. 60 and ⅔° E. 5 and 91-100 chains to the place of beginning, being three acres more or less.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and all the estate, right, title, and interest, claim, or demand whatsoever, of the said parties of the first part, either in law or equity, either in possession or expectancy of, in and to the above-bargained premises and their hereditaments and appurtenances.

To have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part and to his heirs and assigns forever.

And the said parties of the first part, for themselves and their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents they were well seized of the premises above described as of a good, sure, perfect, absolute, and indefeasible estate of inheri-
522 tance in the law in fee-simple, and that the same are free and clear from all encumbrances whatever, and that the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming the whole, or any part thereof, they will forever warrant and defend.

The lands hereby conveyed are the same lands conveyed by Cooledge Eastman and wife to Samuel Breck, recorded in the register of deeds' (office) of Waukesha county, in vol. 39 of deeds, page 544, except the lands sold to Johnson.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

JANE BRECK. [SEAL.]
AGNES MILLER. [SEAL.]
HELEN A. BRECK. [SEAL.]
LLOYD BRECK. [SEAL.]
MARY MORRISON. [SEAL.]
ANNA E. ELDERKIN. [SEAL.]
JOSEPHINE M. ACKLEY. [SEAL.]
CATHERINE LARDNER. [SEAL.]

Signed, sealed, and delivered in presence of—
WARHAM PARKS,
As to Mary Morrison.
N. G. PARKS,
As to Josephine Ackley, Anna Elderkin, Catherine Lardner.
JOHN W. HAPEMAN,
As to Jane Breck, Agnes Miller.
JOSEPH MARTIN,
As to Helen Breck, Lloyd Breck.

STATE OF WISCONSIN, } ss:
Waukesha County, }

Be it remembered that on this twenty-third day of September, A. D. 1880, personally came before me the above-named Mary
523 Morrison, Josephine Ackley, Anna Elderkin, and Catherine Lardner, to me known to be the persons who executed the said deed, and acknowledged the same to be their free act and deed for the uses and purposes therein mentioned.

[N. S.] WARHAM PARKS,
Notary Public,
Waukesha County, Wis.

Exhibit 13.

STATE OF NEW YORK, } ss:
County of Dutchess, }

On this twenty-eighth day of September, in the year one thousand eight hundred and eighty, before me personally came Jane Breck, Agnes Miller, Helen A. Breck, and Lloyd Breck, to me known to be the same persons described, and who executed the within deed, and they severally acknowledged that they executed the same. This deed, so far as the above parties appearing before me, was executed by them according to the laws of the State of New York for the conveyance by deed of real estate.

Witness my hand and notarial seal the day and year first above written.

[N. S.] JOSEPH MARTIN, *Notary Public.*

DUCHESS Co., N. Y.

Received for record at 3:15 o'clock p. m., October 4th, A. D. 1880.
JOHN STEPHENS, *Register.*

Endorsed: Jane Breck *et al.* to John S. Kenyon. Certified copy deed.

Number 268. Dollars, 2,000.

524 By this policy of insurance the president and directors of the Insurance Company of North America. Incorporated 1796. Charter perpetual. Philadelphia.

In consideration of the receipt of eighteen dollars, do insure John S. Kenyon against loss or damage by fire to an amount not exceeding two thousand dollars, as follows:

On his two and one-half story frame detached dwelling-house, with brick and stone basement, situated on the south side of Lac La Belle, and known as "The Oaks." Permission given for the said dwelling to remain unoccupied a portion of each year during the life of this policy if desired by insured.

Lightning clause: In consideration of $5.00 extra premium paid by the assured, a carpenter's risk is granted on the building, covered by this policy for thirty days from this 2d day of Nov., 1881.

LOUISE C. WILLIAMS.

And said company hereby agrees (subject to the limitations and conditions herein expressed) to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums hereby insured, as shall happen by fire to the property above specified, from the second day of November, one thousand eight hundred and eighty-one, at noon, to the 2d day of November, one thousand eight hundred and eighty-four, at noon.

(Printed conditions omitted.)

Attest: CHARLES PLATT, *President.*

MATTHIAS MARIS, *Secretary.*

Countersigned at Oconomowoc, Wis., this 2d day of November, A. D. 1881.

LOUISE C. WILLIAMS, *Agent.*

Exhibit 14. Fr. Bloodgood, examiner.

525 EXHIBIT 15.

John S. Kenyon in act. with W. K. Washburn.

1881.		
March 14.	For bill paid as per rec't	$126 55
April 21.	For bill paid	2 62
"	"	3 58
"	"	1 90
"	"	1 50
		$136 15

Do. contra.

1881.		
March 14.	Cr. by check	$110 00
21.	"	25 00
		$135 00
There is due Hoge for making garden		$3 75
And work done in basement of the barn		2 50

And will make acc't his time.

(Endorsed: Statement of acc't.)

Exhibit 15. Fr. Bloodgood, examiner.

EXHIBIT 16.

AUG. 31, 1881.

Mr. J. S. Kenyon, Esq.

You may pay my boy for the last three days I was at your place, and oblige

Yours truly,

W. K. WASHBURN.

(Addressed: "Mr. J. S. Kenyon, Esq., city.")

(Endorsed: Washburn order, &c. Paid.)

Exhibit 16. Fr. Bloodgood, examiner.

526 RUFUS C. HATHWAY, being duly sworn, testified as follows:

Examined by Mr. JENKINS:

Q. You reside in Oconomowoc, and have for how many years?

A. I have resided there for the last 34 years. I moved there in 1849.

Q. And you have carried on the business of surveying?

A. Yes, sir.

Q. Did you know Mr. John S. Kenyon in his lifetime?

A. I did.

Q. And how long have you known him?

A. I have known him ever since he came there. I cannot remember when he came.

Q. Did you at any time and when do any work for Mr. Kenyon in respect to running a line between Judge Small's farm and this Breck property?

A. Yes, sir; I did.

Q. When was that?

A. Well, I think in the spring of 1880. I cannot remember the exact date; it might be, possibly, 1881. I don't remember.

Q. It was the spring after he purchased the Breck property?

A. I cannot tell that.

Q. Well, it was after he purchased the Breck property?

A. Yes, sir; because he took an interest in it.

Q. Did you know him up to the time he left Oconomowoc on the last occasion, in the fall or early winter of 1881?

A. I cannot remember the date, but I saw him but a few days before he went away, because he told me he was going away.

Q. Where did you see him on this last occasion?

A. Well, in Oconomowoc. I met him on the street, I think.

Q. Was any one with him?

A. I think not.

Q. You had a conversation with him at that time, did you?

A. Yes, sir; I did.

527 Q. How did he appear at that time as to health and mental vigor?

A. I see nothing different from any other times I saw him. I think not. I don't remember of noting anything in my mind.

Q. What was his general appearance and condition as you knew him as to health and mental vigor?

A. Well, he seemed all right as I could see, in every respect, the same as ever.

Q. Were you accustomed to see him about the village of Oconomowoc?

A. Always; I never saw him anywhere else.

Q. Walking alone?

A. Always; almost.

Q. Attending to his own matters?

A. Yes, sir; I suppose so. As far as I ever knew and see.

Q. On this occasion when you ran the line between Judge Small and his property, did he take an interest in that matter?

A. Yes, sir; he did.

Q. Was he present?

A. Always present. I ran the line twice. I ran it in the first place alone, and in the second place in company with the county surveyor.

Q. Was Mr. Kenyon there on those occasions?

A. Both times.

Q. Was Judge Small there?

A. Yes, sir; I guess so.

Q. Was the matter discussed between Judge Small, himself, and yourself?

A. It was.

Q. At the time you ran the line Mr. Breck (Kenyon) claimed to be the owner of this place, did he?

A. Yes, sir.

Q. And the line was run just to mark the boundary between the two places?

A. Between the two places.

Q. Did you discover, during the time you knew Mr. Kenyon, any difference as to general health and mental vigor and ability

528 to transact his own business between him and men generally?

A. I never noticed anything whatever out of place with him.

Q. Did he seem to understand just what he wanted to do?

A. He did, as far as I could see.

Cross-examination by Mr. HURLBUT:

Q. I suppose he might have been sick and you not know it while he was out there, mightn't he?

A. He might have been, some. He might have been indisposed at times and I not see it or know it, I suppose.

Q. His general health might have been failing, might it not, and at the same time you not observe it?

A. I think, perhaps, somewhat, but not a great sight, I guess.

Q. Did you ever pay any attention to him particularly? Did he ever counsel with you?

A. Oh, yes; I have talked with him a great many times—talked with him a great many times about that survey and other things too. I talked with him about many other things.

Q. Along about that time your mental vigor was not first-rate, was it? Wasn't you failing apparently?

A. Not at the time I talked with him. I was all right.

Q. Were you all right at that time?

A. Yes, sir; I wasn't materially sick when I see him.

Q. At the same time you were rather failing and under the weather, weren't you?

A. I do not remember whether I was or not then; I do not think I was.

Q. You have been for a good while, haven't you?

A. Yes, sir; there was something the matter with me at one time there; whether it was in the fall and summer of 1881—I rather think it was, but I wasn't taken down until after that time a good while.

Q. Still you was lingering along with indisposition?

A. Yes, sir; a little something the matter with me, I don't know what.

529 Q. You finally was taken down with that same complaint yourself?

A. No; I hardly think it was that same complaimt I was taken down with.

Q. You were taken down with some other complaint?

A. Yes, sir; I was taken the next February or March afterwards, I think it is; I may be mistaken in the years, but I think it was in March afterwards I was taken with the complaint which resulted in erysipelas. That is all I knew.

RICHARD LARDNER, being sworn, testified as follows:

By Mr. JENKINS:

Q. Where do you reside?

A. Oconomowoc.

Q. How long have you lived there?

A. 16 years, I believe, this fall.

Q. What has been your business in that time?

A. In a drugstore; druggist.

Q. Did you know Mr. John S. Kenyon in his lifetime?

A. I knew him as I would any citizen in the street; in and out of the store; not intimately acquainted.

Q. Up to how late a date did you know him—up to the time he last left Oconomowoc?

A. Yes. His being in the town, of course I seen him every year he was there off and on. I would not say I had seen him within a week or a month before he left.

Q. You had known him all the time he had lived in Oconomowoc summers?

A. Yes, sir.

Q. How often was he in and out of your store?

A. Not very often. I don't think he was what you would call a regular customer at all.

Q. Did you have conversations with him?

A. Yes, sir.

Q. Frequently?

A. Well, when he was in the store.

530 Q. Did you observe him going up and down the streets of the village?

A. Yes, sir.

Q. Alone?

A. Yes, sir. Alone and with other people.

Q. What did you observe, with reference to the appearance of Mr. Kenyon as you saw him and conversed with him, with respect to his health and general mental vigor and ability to transact business?

A. For a man of his age I should judge his ability was good. He was a man well along in years. I should think his mental condition was good.

Q. How did his physical condition appear?

A. For a man of his age I should think it was good.

Q. How old a man should you suppose he was?

A. I should suppose he was between 60 and 70.

Q. Seemed thoroughly to understand himself and what he was doing and talking about?

A. As far as I had any dealings with him.

Q. Did you see him rowing upon the lake?

A. I never did.

Cross-examination:

Q. What business were you engaged in there?

A. I was a druggist.

Q. Did you ever make out any prescription for him while he was sick?

A. I don't think I ever did. I don't remember of ever putting up a prescription that I knew about for Mr. Kenyon; still—well, I think I did once—that is, one time I think he had a spell of sickness. I don't remember of his having frequent spells of sickness.

Q. At any time?

A. I say I think I remember only one time when Mrs. Sutton

and Mr. Sutton used to get prescriptions for him. I remember one time. I would not say that he was an invalid; I don't re-
531 member of but once. Still he might have been every summer there. I was not intimate with him at all. He was not, I might say, a regular customer of ours.

Q. Do you remember of his sending to you for prescriptions from New York?

A. I do not. We frequently got orders through the mail for prescriptions and copies of prescriptions, but I don't remember of Mr. Kenyon's sending for one.

Q. Would you be likely to remember all you got?

A. Oh, no; I never charge my memory with it. It is all kept as a matter of record, and I don't charge my memory with it.

Q. You might have made prescriptions for him frequently and still you not remember it?

A. I could not say that; I think if I had done it frequently I would remember it. If I done it once or twice I might not remember it.

Q. Do you remember of his being sick at any time?

A. I said I remember once of his having a spell of sickness. I could not say what time of year nor what the sickness was.

Q. Nor what year it was?

A. No; nor what year it was. Whether it was last year or next to the last I couldn't say.

Q. Who made the prescriptions?

A. I am under the impression that it was Dr. Miller. I won't be positive on that point.

Q. Do you remember copying prescriptions for him to take to New York with him?

A. I do not; I do not remember that; I might have done so; it is very likely the case. I have done so for a great many persons, and I believe I can only remember one; that was Mr. Case. Not over six months ago he wrote me from where he is now living for a copy of a prescription.

Q. But you have done so for a great many?

532 A. Yes, sir; I remember of one case in Louisville, within six months, for a copy of Dr. Miller's prescription. I don't remember the name or anything about it.

Q. Nor whose prescriptions they were?

A. No.

Q. Mrs. Sutton suggests that I ask you whether he could not have been sick a great many times and you know nothing about it.

A. Certainly; I was not at all intimate with Mr. Kenyon.

Q. It was a mere casual acquaintance you had with him?

A. Yes, sir; I always saw him on Sunday going to church, that is about all, and down after his mail passing the store. I was not at all intimate with Mr. Kenyon.

Redirect examination by Mr. JENKINS:

Q. Can you state when that sickness was?

A. No, sir.

Q. You cannot state how long it was before he left Oconomowoc?
A. I cannot tell in what year it was.
Q. Do you know whether it was some time before he left?
A. I could not say as to that. Now you speak of it, I just remember his having a spell of sickness, but I was under the impression his health was good for a man of his age.

By Mr. HURLBUT:

Q. You were not the prescription clerk, were you?
A. I was.
Q. All the while?
A. I was there all the while. We never had any one person as prescription clerk. I always considered myself the head as far as that is concerned. We had apprentices, but they never put up prescriptions.
Q. Others put up prescriptions?
533 A. Yes, sir; sometimes all, and sometimes only one besides myself. He was not a regular customer of ours.

R. C. HATHAWAY recalled for further cross-examination;

Q. You may give the names of all that you recollect that were there at the time you fixed those lines.
A. Which time, the last time?
Q. Well, both times, all times. You incidentally stated once that you run it twice, and you only talked about the time you established the lines the last time.
A. Well, I know Mr. Kenyon was there and Mr. Small was there, and, I think, in running the line, at the time we run it, that Mr. Sutton was there. I am pretty sure he was.
Q. The husband of the plaintiff in this case?
A. Yes, sir. I think he acted as flag-staff man for us at that time when the county surveyor and myself run the line out and established it the last time.
Q. What was said or done by Mr. Sutton while you were there?
A. I think he carried the flag-staff; that is what I think. I think he was the only one that helped us, besides Mr. Kenyon, in running that line.
Q. And he and Mr. Kenyon were the two that helped you run the line?
A. Yes, sir.
Q. They were there together?
A. Yes, sir; they were.
Q. Did one of those men have about as much to say as the other in the matter?
A. Well, Mr. Sutton talked about it at that time and subsequently; he seemed to have an anxiety about it. Subsequent to that time he came to me and said they found——

Mr. JENKINS: You were only asked what took place when Mr. Kenyon was there and they were running the line.

534 Q. Who came after you to go there?

A. I think that Mr. Kenyon came after me.

Q. Who took you over there?

A. I think Mr. Loomis, the county surveyor, and myself walked down there.

Q. Who took you away from there?

A. Mr. Sutton took me away from there on a boat; rode back in a boat.

Q. When you got through with your work Mr. Sutton took you home in a boat over to where he lived?

A. Yes, sir.

Q. On Main street?

A. Half or three-fourths of a mile across the water; we rode in a boat, not rowed, but he used a sail-boat.

Q. I forget whether I asked you whether you knew as to the fact whether Mr. Kenyon was sick and confined to his bed at any time?

A. I don't know anything about it.

Q. Then your seeing him was a casual acquaintance on the street?

A. Yes, sir; pretty much all on the street, except he was in the office and in my house.

Q. You weren't at his house; you weren't on social, visiting terms with him?

A. I was at Mr. Sutton's house once, I think, with him.

Q. When was that?

A. A few years ago; probably four years ago.

Q. What was that occasion?

A. I don't know.

Q. Were you there on a social visit?

A. No. I wanted to see Mr. Kenyon about a matter, and called there at the house.

Q. About a church matter?

A. Well, not exactly. I was talking about getting up a school. It might be a longer time ago than that when Mr. Loomis (Allison) was there.

535 Q. Is that the only time you ever called at the house where he lived?

A. To see him?

Q. I mean when you did see him?

A. Yes, sir; that is the only time I called at the house, I think.

Q. That is at the residence where he lived?

A. Yes, sir.

H. S. BENJAMIN, being duly sworn, testified as follows:

By Mr. JENKINS:

Q. You live in the city of Milwaukee, and did so live during the year 1881?

A. Yes, sir.

Q. And were at that time a dealer in carriages, wagons, buggies, and phaetons?

A. Yes, sir.

Q. Do you remember of Mr. John S. Kenyon, of Oconomowoc, purchasing a carriage or spring wagon of some kind of you in 1881?

A. Well, I think it is in 1881; yes, sir.

(Bills shown witness.)

Q. Can you state the time that he made the purchase of you—the month?

A. The month that he made the purchase; well, I do not know as I could state the month.

Q. Having refreshed your recollection from looking at these bills, can you state the month when he made the first purchase?

A. I think it was the month of August, as stated in the bills.

Q. That was the second purchase?

A. Oh, the first purchase.

Mr. HURLBURT: I do not see the relevancy of the testimony, and I will interpose an objection.

Q. When was the first purchase made?

A. In July, 1881.

Q. What was purchased at that time?

A. Well, a two-seated Surrey.

536 Mr. HURLBUT: I object to that testimony. I do not see what it has to do with the case.

Q. When was the second purchase made, what month?

Mr. HURLBUT: You may note an objection to that also.

A. I do not know as there was any second purchase made at all. There was only one purchase made, and there was a correct bill made of that purchase in August.

Q. Who came to make that purchase?

A. Mr. Kenyon?

Q. Did he come alone or with some one else?

A. I could not just remember. He came three or four or five times there before he finally purchased. I think he came alone each and every time that I saw him. I understood he came there once when I was away. I do not know who came at that time.

Q. There were three or four different occasions when there were negotiations between you in respect to this purchase?

Mr. HURLBUT: You may note an objection to that.

A. Yes, sir; when I talked to him personally.

Q. What was his appearance and conduct at that time, as you observed him, with respect to his physical condition and mental vigor, and as to his ability to do business and the manner in which he did it?

Mr. HURLBUT: You may note an objection to that. I do not see what that has to do with the case.

A. I do not know much about his vigor. He was on oldish man, but he had considerable mental vigor I thought in driving a bargain.

Q. In what respect; was he sharp and shrewd?

A. A pretty close buyer I considered. It took him a good while to buy a small job.

537 Q. Did you observe anything like mental decline in him?

Mr. HURLBUT: Note an objection.

A. I could not say that I did; no.

Q. Did he seem to know what he was about, and transact business in a very close and able way?

A. I can only speak so far as he done his business with me; so far as buying I could see he was a very close, sharp buyer.

Q. Where did you send that wagon which he purchased to him?

(Objected to as before.)

A. I believe to Oconomowoc.

Q. Did you at any time, and when, draw upon him for the amount of that purchase?

A. Well, I think we drew upon him.

Mr. JENKINS: I produce to the witness a draft drawn by H. S. Benjamin on John S. Kenyon, and ask him if that was the draft which he drew upon him?

(Objected to.)

A. Yes, sir.

Q. It was deposited in your bank and went through?

A. I don't know whether it was deposited here or sent direct to the bank at Oconomowoc.

Q. H. K. Edgerton, in whose favor it was drawn, was the cashier of a bank in Oconomowoc?

A. Yes, sir. It was sent direct to him.

Q. And you received the avails of it?

A. Yes, sir.

(Draft annexed as exhibit.)

$111.00 MILWAUKEE, *Aug.* 6, 1881.

On demand pay to the order of H. K. Edgerton, Esq., one hundred [and] eleven $\frac{00}{100}$ dollars & exchange, value received, and charge the same to account of

H. S. BENJAMIN.

To J. S. Kenyon, Esq., Oconomowoc, Wis.

(Cross-examination waived.)

H. C. KOCH, recalled for further cross-examination.

By Mr. HURLBUT:

Q. In your direct examination you stated you had several conversations with Mr. Kenyon in relation to that building?

A. Yes, sir.

538 Q. You may state if in any of those conversations he said anything to you as to who that property or house was being built for or anything to that effect?

(Objected to as not proper cross-examination.)

A. Well, when he came in—he was in several times before I completed the plans—and I talked with him about the rooms and who they were for. I asked him if they were for his wife's room and for his children. He then told me he had no children and no wife. He said he was a single man. He said there was a family living with him that had been living with him some time, and he took care of them and they took care of him, and that he was going to build that house for them; that he would be here only in summer and in the winter he would go away.

Q. Did he give the names?

A. Yes. Mr. and Mrs. Sutton or Dayton—Sutton I believe he said.

Q. Mr. and Mrs. Sutton?

A. Yes, sir.

Q. Mr. Sutton, I think you said, came in with him?

A. Yes, sir—not at first. After he had been there two or three times.

Q. This was before Mr. Sutton came in that he made these statements to you?

A. Yes, sir.

Q. In the conversation that you had with him in relation to it?

A. Yes, sir.

Q. That you testified to on your direct examination?

A. Yes, sir.

Q. Anything said when Mr. Sutton was there in relation to his wanting the building in accordance with the desires of Mrs. Sutton, or anything of that kind?

A. Well, about the arrangement, he had a sketch he told me Mr. Sutton made himself, laid out how he wanted all the arrangements made, and that is how I came to speak about it. I objected to some of his arrangements. I asked him the reason why about it
539 and he told me about these matters I just related.

Q. That he wanted them as Mrs. Sutton wanted them?

(Objected to as leading, suggestive, and not proper cross-examination.)

A. Yes, sir.

Q. You may repeat just what he did say.

A. What I said before. I believe they had a kitchen down below. I thought it was not hardly proper in a suburban residence to have the kitchen in the basement; I thought it was not very proper for a city house. Then he told me that this house he was building it more for the people that was living with him.

Q. Did he give the name?

A. Yes, sir; Mr. and Mrs. Sutton. He said there was no children there. I don't know that he said Mrs. Sutton or Mr. Sutton He used, I think, the word "them;" I could not say which party he meant.

WARHAM PARKS, being duly sworn, testified as follows:

By Mr. JENKINS:

Q. You reside in Oconomowoc, and have for how many years?
A. 16 years.
Q. You are a lawyer by profession?
A. Yes, sir.
Q. Did you know Mr. John S. Kenyon in his lifetime?
A. I did.
Q. And for how long a time?
A. Well, for all the time, never intimately; and knew him while he lived in Oconomowoc 4 or 5 years, I guess.
Q. Did you have any business transaction with him, and when?
A. As the attorney of Mr. Breck I made the conveyance of the property to him which I understand is in dipute in this action, and at another time advised with him somewhat about the sur-
540 vey of the land. I think that is all the business I had with him, except having more or less talk with him about postal matters, as he always had trouble with the Post Office Department.
Q. Did you witness the execution of the deed from Breck to Mr. Kenyon, and take the acknowledgment of it?
A. My recollection of it is that Mr. Breck at that time resided in New York, and that the deed was sent there for execution. (Examines deed.) No, this deed was executed by the different heirs of Mr. Breck, part of which was before me and part of which was before a notary in New York.
Q. Now, can you, having looked at the certified copy of the deed, state as to the time when that transaction took place—the month and the year?
A. Yes, sir; it was in September, 1880.
Q. Were you accustomed to see Mr. Kenyon after that and up to the time he left Oconomowoc for the last time?
A. Oh, yes; most every day I passed the house where he resided, going up and down from home myself. I saw him almost every day.
Q. Did you see him on the streets?
A. Yes, sir.
Q. Going to and from the post office?
A. Yes, sir; and met him in the post office. After that conveyance he and Judge Small had some difficulty about their line. He came to me and asked my opinion about Mr. Hathaway's capacity as a surveyor, and asked me if I knew the county surveyor, Mr. Loomis, and whether it would do to trust to him to run the line.
Q. In your acquaintance with Mr. Kenyon, as long as you knew him and in the business transactions you had with him, what did you observe with reference to his physical condition and his mental vigor and his manner and the ability with which he transacted business?

541 (Objected to.)

A. He seemed to be all right physically. He seemed to be acute and sagacious and clear-headed in all his business transactions that I ever saw; seemed to know just what he was about and just what he wanted.

Q. At the times that he was at your office and you saw him on the street and at the post-office was he accompanied with anybody or was he alone?

A. He was entirely alone when he transacted this business. I never met any other person but him. He had his abstract, and said he had looked through it himself and wanted me to look through it. I looked through it with him. He seemed bright about such matters. He seemed as though he had had dealings of that kind before. His mind seemed good.

Q. Did you often see him on the streets of the village unattended?

A. Yes, sir.

Q. He walked about and acted very much as any other man?

A. Oh, no; he was a man of years.

Q. As any other man of his age?

A. Yes, sir.

Q. He was not in any active business?

A. No, sir.

Q. You have seen him on the lake sailing or rowing?

A. Well, I never go on the lake myself. No, sir; I don't know as I ever did. I may have seen him sailing.

Cross-examination by Mr. HULBUT:

Q. Were you in the habit of visiting him socially and seeing him at his house?

A. No, sir.

Q. Did you ever visit him at his house?

A. No, sir; he was not a person that I could take any pleasure in visiting.

Q. Do you know of his being sick?

A. No; I was not sufficiently intimately acquainted with
542 him in private life to know when he was sick or well.

Q. You only saw him these times when he was out?

A. Well, most every day.

Q. You say "most every day." What do you mean by that? Do you mean that he was out occasionally and casually you saw him? Did you keep any account of the times so that you could say that it was almost every day?

A. Yes, sir; I think I can safely say he was out almost every day. He might have had sick spells for a week or so that I might never have known of. I have had them myself when I would not see him. I have been sick myself so I would not see him for a week or so, and he might have the same thing and I not know anything about it. He was an elderly gentleman, and I would meet him almost every day when I was down town as I met you and hundreds of others. If he was sick, his absence was not noted by me. I was not intimately enough acquainted with him to enquire or note his absence. He seemed to me to be a very parsimonious man, and sort of narrow-

minded and bigoted. I never liked him very much. I never sought his society. He found a great deal of fault with the post-office arrangements because the New York Herald did not arrive at breakfast every morning, and reported us to the department; because his paper got into the wrong box he made a fuss about it, and when the authorities required him to pay for a key for the box he would not have it; and when we told him we would not let him off, he carried the key off and I had to pay for it myself. He was one of these men whose mind not being very much occupied with great things it was impressed with very small ones.

Re-direct examination:

543 Q. Do you remember or do you know whether Mr. Kenyon conducted the negotiations with Mr. Breck as to the purchase of the property?

A. Mr. Breck was dead. This property was purchased of the heirs. Yes; I know of the negotiations that were carried on between Mr. Ackley and Mr. Lardner, the heirs of Mr. Breck, who lived at Oconomowoc, and Mr. Kenyon. They both consulted me during the pendency until they finally fixed on the price. They haggled a good deal over the price until, finally, Mr. Kenyon, Mr. Ackley, and Mr. Lardner agreed on the amount, and the others simply ratified it by signing the deed.

(Adjourned to September 10, 9 a. m.)

SEPTEMBER 10TH, 1883.

Parties appeared pursuant to adjournment, Mr. Van Alstine for the complainant, and Mr. Jenkins for the defendants. Mr. Jenkins announces that the testimony on behalf of the defense is closed, and by consent adjourned to September 17th, at 10 a. m., when the rebutting testimony on the part of the plaintiff will be commenced.

(Title of cause.)

OCTOBER 12TH 1883.

Testimony resumed pursuant to adjournment.

JOSEPH SCOTT (examined by Mr. Winfield Smith), called by plaintiff, being sworn, testified:

Q. You live in Oconomowoc, in this State?
A. Yes, sir; I came there in 1871; I was born in this State.
Q. In 1880 were you in charge of a lumber yard there?
A. Yes, sir.
Q. For others?
A. Yes, sir; for Mr. Vilas.
544 Q. You have been a contractor at times for building?
A. Yes, sir.
Q. Did you know Mr. John S. Kenyon in his lifetime?
A. Yes, sir.
Q. At Oconomowoc?
A. Yes, sir.

Q. You became acquainted with him through church matters in which you were both interested?

A. Yes, sir.

Q. Were you treasurer of the church which he attended and took an interest in?

A. Yes, sir.

Q. Did you have any conversation with him in regard to the building that he proposed to put up there?

(Objected to as not rebuttal testimony, and as incompetent and improper.)

A. Yes, sir.

Q. How long have you known him?

A. At the time of his death, I think, about seven years.

Q. You had a conversation or several conversations with him about the construction of the house?

(Objected to.)

A. Yes, sir.

Q. Did he show you the plans?

(Objected to same as before.)

A. Yes, sir.

Q. Tell you how he had made them?

(Objected to as before.)

A. Yes, sir.

(Objected to as before.)

Q. Did he tell you the purpose of the building of the house?

(Objected to same as before, and as leading.)

A. Yes, sir.

Q. What did he say the house was to be built for?

(Objected to as not rebuttal, and as incompetent, irrelevant, and improper.)

545 A. For Mrs. Sutton for a dwelling house.

Q. Anything more did he tell you?

(Same objection as before.)

A. It was for a dwelling house for Mrs. Sutton; she was keeping boarders at that time.

Q. Did he say anything more as to the future occupation of it, and what?

(Same objection as before.)

A. Mrs. Sutton was likely to occupy it longer than himself.

Q. What did he say about himself in that connection?

A. Talking about the contract from Mr. Kenyon to build the house, the idea was to build a house according——

(Objected to by defendant.)

WITNESS: Mr. Kenyon said to me, "What will you build this house according to the plans and specifications for? I told him for so much money. The money exceeded what he wanted to put into the house, and I said to him that it could be cut down by leaving out some of the elaborate finish in the house, and that I would come to Milwaukee and see the architect, Mr. Koch, in regard to it. He came in the same day. On the way returning home I made an arrangement with him to do the work by the day, and I said to Mr. Kenyon that if I left out the marble floors and the hardwood finish that it could be built for at least two thousand dollars less. Mr. Kenyon said to me, 'As far as I am concerned I had rather have a pine floor with a carpet on than a marble floor; it will be warmer and easier for me; but I will see Mrs. Sutton, and if she wants a marble floor and hardwood finish we will put it in according to the plans; but I would rather have a pine floor and carpet; but she will occupy the house longer than I will, as I have had trouble
546 with my head twice, and will probably not live a great while longer, and the house is for her occupancy; I want it just as she wants it.'"

Q. Did he tell you what kind of trouble?

A. He had two strokes of apoplexy.

Mr. JENKS: Is that what he said?

A. I think apoplexy; he had two strokes.

Q. He said so?

A. Yes, sir; going out on the cars he had had two strokes, and the third would probably end it, and he didn't want to have the trouble; that is why he wanted to let the contract out and out; he didn't wish to have any care. I then made an arrangement to do it by the day, so that Mrs. Sutton or himself could suggest any changes that they wished without making void any contract. He then, before we got home, made arrangements with me to do it by the day, with the full understanding that any suggestion or any changes which Mrs. Sutton wished to make in it that it could be made.

Q. What house is this your are speaking of?

A. It is a house situated on the lake at Oconomowoc, on the Breck property. I knew it by the name of the Breck property.

Q. There was no other house, was there, built by Mr. Kenyon in Oconomowoc that you know of?

A. Not any building built from the foundation; no, sir.

Q. Did you go on and do that work or did you surrender it?

(Objected to.)

A. I surrendered it.

Q. Who did do the work?

(Objected to as not rebuttal and as incompetent and improper.)

A. The labor was performed by Jacob Weltner and men.

547 Q. Was there anything between you and Mr. Kenyon said about Mr. Sutton in connection with the work; and, if so, what was said?

(Same objection as before.)

A. When I made known to Mr. Vilas that I was going to quit the lumber business and go to taking contracts again, and that I had already made an arrangement with Mr. Kenyon to do the work—"I can't hear to it; I will go with you and see Mr. Kenyon, and make an arrangement with him so you will not go ahead with the work." We went to see Mr. Kenyon, and Mr. Kenyon released me, provided I could get somebody else to take the place; at that time, in the presence of Mr. Sutton and him, I made arrangements, as the house was for Mr. Sutton and Mrs. Sutton, that Mr. Sutton have charge of the work, and keep the time and superintend it generally, and that Jacob Weltner and some men would come to work by the day for him; we went over and saw Mr. Weltner and made arrangements.

Q. Do you know whether Mr. Sutton did, in pursuance of that arrangement or otherwise, superintend the work afterwards?

(Objected to as not rebuttal, irrelevant, and incompetent.)

A. He did.

Q. How do you know that?

(Same objection.)

A. I know that, because I was up there twice, and that he came to the office and ordered material; he also drew the plans for the finish of the cornice and frames; he came and got them, and he took them up to the building; he ordered the material that was used—came to the office and ordered it.

Q. How long did the work go on there?

A. About six weeks.

548 Q. Do you know what time it began about?

A. About the first of September.

Q. In any of your conversations did Mr. Kenyon assign to you any reason why he was building that house for Mrs. Sutton; if so, what?

(Objected to as not rebuttal and irrelevant and incompetent.)

A. The reason that he did give me for building the house was that Mrs. Sutton had taken care of him, and promised his wife to take care of him as long as he lived, and that he was building the house for them and also for himself, but that she was likely to occupy it longer than himself; he wanted it just as she wanted it.

Q. In what way was she taking care of him?

(Objected to; that it is not rebuttal and irrelevant and incompetent.)

A. He was living with her, and she waited on him and looked after him.

Q. Do you know anything at all about his health, and what do you know?

(Objected to as not rebuttal.)

A. I know he was subject to a trouble with his head; that seemed

to be the only point of health that I knew of; his head bothered him; he could not rely upon himself.

Q. How do you know that?

A. He was at my house one evening in regard to raising the salary for the minister, and he told me something, and also I was inquiring about his business; he told me, in regard to his health, he had had two strokes, and that his wife, speaking about his wife—that Mrs. Sutton was to take care of him as long as he lived.

549 Q. What did he say more to you about his health, as to particulars, than you have mentioned, if anything?

A. I don't remember of him saying anything else?

Q. Do you recollect of his speaking of having pains in his head or having discomfort in his head?

A. His head ached—a buzzing in his head.

Q. A buzzing in his head and headache he spoke of, did he?

A. Yes, sir; he very frequently complained of that Sundays in church, getting him to stay to Sunday school, his headaches and the buzzing, he could not remain in Sunday school part of the time.

Q. Was it a common thing for him to complain of trouble in his head? Was it frequent or infrequent?

A. Well, he mentioned it to me several times at different intervals; I don't remember just what; I did not pay particular attention to it.

Q. On these plans did he point out to you which was to be his room that he was to occupy?

(Same objection.)

A. Yes, sir.

Q. Do you know anything peculiar about the arrangement of that room or the situation of it or the connection of it with other rooms, and, if so, what?

(Same objection.)

A. Speaking of the ventilation of the room, he showed me which would be Mrs. Sutton's room and which his room, and a certain closet cutting into the room I thought could be done away with. He said he wanted that closet there and also the door; he could not have that door stopped up, because he was bothered nights and liable to be taken any time; he wanted that door to remain between those two rooms so that at any time he could call Mrs. Sutton, or Mr. Sutton could hear; for that reason he would have that door there.

Q. What door?

A. It was a door connecting two bed rooms, Mrs. Sutton's room and his room.

550 Q. Did he say anything to you, or did you observe anything, and, if so, what, in addition to these matters you have mentioned, illustrating his reliance upon Mrs. Sutton or the care which she took of him?

(Same objection as before.)

A. I observed he never went anywhere to meeting scarcely with-

out Mrs. Sutton was with him. I remember frequently inquiring of him why he did not attend prayer meeting more; he said his health was so poor Mrs. Sutton didn't like to have him out nights; for that reason he did not attend prayer meeting any more. I spoke to him about attending trustee meetings of the church, and he gave the same reason; Mrs. Sutton didn't like to have him out nights in the night air, and he didn't come.

Q. Did you see the two together at any time so as to observe anything of that sort, and, if so, what did you see?

(Objected to as not rebuttal.)

Q. I mean did you see Mr. Kenyon and Mrs. Sutton together at any time in such a way that you were able to observe any care on her part, or any reliance on his part?

A. I have seen them on the street together, sitting out talking together, and out riding together. I have heard her at different times tell him he must not do so and so; that he must go home. He always went.

Q. Did you see enough of that to determine whether Mrs. Sutton was really in constant charge of his health and caring for it?

(Objected to as not rebuttal and as irrelevant and incompetent)

A. He told me what his wife said; it all went to corroborate that she was exercising care over him.

551 Q. Did Mr. Kenyon say anything to you that fall or winter in regard to his intentions for the future as to his home or residence; if so, what?

(Objected to as not rebuttal and as irrelevant and incompetent.)

A. He told me he would have the house done by the 20th of May, as he wished to return from New York and bring his furniture and make his future home there. He also said he would fetch his letters and unite with the church at Oconomowoc and make his future home in Oconomowoc; spend the winters there.

Q. What time did he tell you this?

A. It was about the 27th or 28th of August, 1880; it was the year he built the house — that he commenced the work; it was a day or two before the house began.

Q. Did he go away that fall?

A. He went back to New York on some business about the first or second week in September. He was gone about two weeks and returned, and he came to my house and wanted to know if the salary had all been raised for the coming year. He came back, and Mr. Sutton had the work pretty well on the way by the day.

Q. He went later in the season again to New York?

A. He went to New York a few days before Thanksgiving; as to the day I don't remember.

Q. And never returned?

A. Never returned.

Q. Did he speak to you at any time about his family or residence in New York?

(Objected to as not rebuttal and as irrelevant and incompetent.)

A. Yes, sir; he said he had a house in New York, and how it was warmed, and that Mrs. Sutton was his housekeeper, and had taken care of his wife, and that it was the wish of his wife that Mrs. Sutton would be provided for as long as she lived.

552 Q. Did he say anything to you about his sisters or brothers or other relatives in New York?

A. I don't remember of his ever mentioning as to whether he had brothers or sisters; I don't remember.

Q. Did he tell you where he stayed when in New York?

(Objected to as not rebuttal and as irrelevant and incompetent.)

A. At his residence.

Q. Do you know whether he made any arrangement in other matters, as to church matters or anything else, with the view of returning in the spring to remain permanently in Oconomowoc?

(Same objection as before.)

A. He did. He specified a certain amount of work to be done on the church, and he said when he returned in the spring he wanted a porch put in front of the church; that he would pay for it, pay for all the material, and we were to pay for the labor of it; and he further said that he would bring his letters, as I have already stated, and become a member of the church there; remain with us the balance of his days. He also said his intention was to fix it so the church would have an annual income towards the ministry.

Q. How long is it since you have communicated to Mrs. Sutton, the complainant here, or to her counsel, the matters which you have now been testifying to?

(Objected to as irrelevant and immaterial.)

A. To the counsel, Mr. Hurlburt, about three weeks, and Mrs. Sutton about one week.

Q. Did either of them know, so far as you are aware of, the matters about which you have been testifying being within your knowledge until four weeks ago?

(Same objection.)

553 A. I know they did not, because I have never said anything.

Cross-examined by Mr. JENKINS:

Q. Where was it that you communicated what you have testified to to Mr. Hurlburt?

A. On the depot platform I first met Mr. Hurlburt in regard to this matter.

Q. How did it come about?

A. Mr. Hurlburt said he heard I knew something about the Kenyon business up there, and that I had talked of taking the work. I said I did agree to take the contract, and had a good deal of talk with Mr. Kenyon and Mr. Sutton in regard to it. He said, "I will see you later in regard to the matter."

Q. On this occasion when you surrendered this agreement to build where were you all when you surrendered it?

A. On the street in front of Mr. Kenyon's residence.

Q. You and Mr. Vilas went up together?

A. Yes, sir.

Q. Who was there?

A. Mr. Kenyon and Mr. Sutton.

Q. Where was Mrs. Sutton?

A. At Dr. Miller's, across the street.

Q. So that Mr. Sutton knew at that time that there had been an arrangement by which you were to build?

A. Yes, sir.

Q. And Mrs. Sutton knew it?

A. Yes, sir.

Q. You said that Mrs. Sutton was keeping boarders at the time you first made your arrangements with Mr. Kenyon. Was that so?

A. Yes, sir.

Q. Where?

A. At her residence on Main street, opposite Dr. Miller's.

Q. Did you know that Mr. Kenyon was boarding with her?

A. Yes, sir.

554 Q. Did you know that he was paying board?

A. I know that he was paying ten dollars a week towards the expenses of the house.

Q. How did you know that?

A. He told me.

Q. Did you know how Mrs. Sutton got that place on Main street?

A. I never knew the exact particulars.

Q. Did you know that Mr. Kenyon had given it to her?

A. Only by hearsay.

Q. Not from Mr. Kenyon?

A. No, sir; not from Mr. Kenyon.

Q. When did you first become acquainted with Mr. Kenyon?

A. I think it was in 1873 that he first came to Oconomowoc; I got acquainted with him the first Sunday.

Q. How often were you accustomed to see him?

A. I would see him at least once a week, and sometimes oftener. He was at church pretty much every Sunday while in Oconomowoc; of course he did not spend the winters there.

Q. When did you understand from him that these strokes of apoplexy were?

A. He did not tell the dates.

Q. Was that the first you had known of it?

A. The first I had heard of it; yes, sir.

Q. And you had seen him once a week certainly from 1873 down to the time he left Oconomowoc?

A. Yes, sir; that is during the summer.

Q. And at other times you would see him on the street?

A. Yes, sir; he came to the office frequently to pay for lumber and to order different things; he also had the subscription list, and would come to me every day or two to inquire about different men.

Q. How often would you see him at your place of business?
A. He did not come into the place of business not to exceed once in two weeks.
555 Q. About once in two weeks you would see him there?
A. Yes, sir.
Q. During what time was this?
A. Somewheres between the first of June and the first of October.
Q. What did you say he came for?
A. They were buying lumber all the time, and he would come in and order something; he would order frequently lumber; he would bring up an order signed by Mr. Sutton or some other gentleman; he would come in and leave a note calling for lumber; then he would come in and pay for his own.
Q. What do you mean?
A. For his own lumber he got for repairing sidewalks and little work around.
Q. Sidewalks where?
A. In front of the Main street residence—Mrs. Sutton's residence.
Q. And what else?
A. He would come and hand in money; different ones would hand him money on the street; he went around with the subscription list.
Q. For what?
A. For the minister; they would hand him money; he would fetch it to me.
Q. Did you see him elsewhere than at your place in Oconomowoc?
A. I hardly ever saw him on the street evenings, because he was hardly ever out in the evening, and I was confined to my business during the day.
Q. When he came to church, whom did he come with?
A. Mrs. Sutton always.
Q. Mr. Sutton, too?
A. Mr. Sutton came pretty much all the time; not all the time; his health was poor; most of the time Mr. Sutton was along; not all the time; especially in the evening.
Q. When he came to your shop, was Mrs. Sutton with him?
A. No, sir; not all the time. I think she drove there in a buggy several times with him.
556 Q. But he often came along?
A. Yes, sir.
Q. Afoot?
A. Yes, sir.
Q. Where is that shop with reference to where he lived on Main street?
A. It is a quarter of a mile.
Q. He seemed competent to transact business?
A. Well, he used to complain very frequently of his head.
Q. He understood business—what he was doing?
A. Seemingly. He complained of the walking; whenever he got into a perspiration it bothered him somewhat.
Q. He was very regular in his attendance at church, I take it?

A. Yes, sir.

Q. And used to come to the Sunday school?

A. The Sunday school was immediately after the church. He staid—well, he staid half of the time. He was elected assistant superintendent, but he could not fill it very well on account of his head; he could not talk so he could be heard over the room.

Q. When did he leave off attending the prayer meeting?

A. He never attended the prayer meeting but very little.

Q. That was during the week?

A. Yes, sir; Thursday evenings.

Q. Do you remember, as Mr. Vilas did, of Mr. Kenyon's coming down there and ordering some lumber while the house was being put up?

A. I can't remember of Mr. Kenyon's coming. I know Mr. Sutton used to be there a good deal, but I don't remember Mr. Kenyon's coming.

Q. You were at this Breck place once or twice while the building was going on?

A. Yes, sir.

Q. Did you see Mr. Kenyon there?

A. Mr. Kenyon was there at one time.

Q. What was Mr. Kenyon doing?

557 A. Mr. Kenyon was sitting down on some boards outside of the building looking at the men work on the cornice.

Q. Where was Mr. Sutton?

A. Upstairs, looking out of one of the windows close by where they were at work.

Q. Did you ever see Ms. Kenyon rowing or sailing on the lake?

A. I never saw him.

Q. When Mr. Kenyon went to New York in September he went alone, did he not?

A. When he was gone for two weeks he went alone, so far as I know.

Q. He went alone and returned alone?

A. So far as I know.

Q. Neither Mr. nor Mrs. Kenyon (Sutton) accompanied him?

A. Not to my knowledge.

Q. And Mr. Kenyon told you, if I correctly apprehend you, that he intended in the spring to bring out his furniture from New York and live permanently in Oconomowoc and unite with the church there?

A. He did, sir. Bring out the papers, his church letter; he was not a member of the church at Oconomowoc, he was a member of the church in New York. He would bring his letter and unite with the Congregational church there.

Q. If I understood you correctly, you said that he was building that house for himself to live in and Mr. and Mrs Sutton, and that he expected that Mrs. Sutton would survive him, and he wanted that house fixed so she could live in it after he was gone. That is the idea of it?

A. Yes, sir.

Q. You are still with Mr. Vilas in business?

A. Yes, sir.

Q. You knew of Mr. Vilas having been examined as a witness in this matter?

A. Yes, sir.

Q. And the matter of this suit has been common talk in Oconomowoc?

558 A. It has not. I have not heard it talked of on the street. Two or three have said something to me, but I have not said anything about it. There has nobody said anything to me about the suit, except Mr. Vilas.

Q. When was that?

A. At the time he was first examined. He said he was sworn, and also Mr. Ackley, his partner, said they were subpœnaed to come in. Mr. Ackley said he was not sworn. That is all that was said about it.

Re-examined:

Q. Your age is about what?

A. I was born in 1849.

In taking the testimony of Miss Maria Kenyon in New York the complainant omitted to ask her with respect to certain letters written by her, one to her brother, John S. Kenyon, under date of March 23d, 1878, to the complainant, under date of March 25th and March 30th, respectively, and it is now stipulated that these letters, now produced, shall be admitted as part of her cross-examination, and that her written explanation thereof, in a letter to Edgar K. Brown, Esq., under date of July 14th, 1883, which is also now produced, shall be deemed her explanation of them, in the same manner as if the letters had been produced to her upon such a cross-examination and she had testified as stated in her letter of explanation:

HARLEM, *March 23d*, '78.

DEAR BROTHER: I have just got Sarah's letter telling me you have been sick. I am very glad you are better now and that you have such a good doctor and nurse. I know they will take the best of care of you; yet we don't want to tax them too far, and I

559 think, perhaps, one of us had better come and relieve Sarah somewhat. What do you say? May I pay a visit to Oconomowoc and see its beauties, and accompany you when you get ready to come home? I will come, if you say so.

Maggie was quite sick for a few days with an ulcerated tooth and swelled face, but is better now. Maggie Bergen was over last week and stayed a few days, and attended an entertainment given by the ladies of our church. They made $65 by the supper. On Saturday evening our folks went up to your church. Burbank read and the University Glee Club sang. The receipts were nearly a hundred dollars. Mrs. Gillet's class gave the entertainment.

Your house opposite is not rented yet. If I take it, and go to housekeeping, will you come and board with me? It would be a nice

quiet arrangement and not the first time I had kept house for you. Aunt Letitia was very comfortable on Saturday. David is still the same. There is nothing especially new. We all join in love.

Yours very affec. MARIA.

HARLEM, *March 25th*, 1878.

DEAR SARAH: Your letter is the first intimation we have had that John is sick, and, notwithstanding your assurances of his being better, we feel very anxious. I know you will do anything for him that can be done, and have confidence in the doctor's ability, but we wish very much he was at home. Yet I know it would not do for him to come just now and alone. Now we can all see that John was not as strong as usual when he went away, but he has so often come and gone alone that we did not worry about him. I feel as if I must come right on to Oconomowoc, and be ready to come home with him, and thus relieve him of all anxiety. You must answer this right away, won't you, and tell me what is best to do and just how he is. We know the disease of old, and think we understand how to do for him, and are so sorry he is so far away, but yet, if he must be away, very glad that he is with one who has always been so kind and considerate for him.

560

Charlie must be careful of himself, for what would you do if he too should be taken sick. These changeful days and March winds are terrible for those who are not very strong, and this wintry day with its fierce wind is carrying us back into the middle of January again. Now, with much love and an anxious desire to hear again right away, I am yours.

MARIA S. KENYON.

Won't you send us a line as soon as you get this. I enclose a few lines to John.

HARLEM, *March 30th*, 1878.

DEAR SARAH: I have not had anything direct from you since the 23d and am anxious to know from yourself if John is decidedly well again, as his telegram and letter to Sam would have us believe. Can you not send me a postal, so that we may be relieved from anxiety and feel that he is doing well under the doctor's care? I hope he does not worry about the church, because there is no reason why he should. I saw Mr. Colwell and he said the Presbytery had given them such aid that with Mrs. Green's gift and what they could raise, or had already raised, they would be clear of debt, and he felt quite confident of their being already relieved from their heavy burden. Mrs. Gillette's Bible class are doing finely with a series of entertainments, and all the congregation have entered with spirit into the effort to help themselves; so success is pretty certain when that is the case.

561

We have not made John's sickness public, Mr. Colwell, out of our own family being the only one who knew of his being unwell, and I did not, as you had not, told him how he was affected. Aunt Letitia would worry herself sick at the thought of his being so far away and not well, so Sam and I thought best to say nothing to any

of them; but one of her first questions is: "Have you heard from John?" I refer to my last letter almost two weeks since when he was well. We are all as well as usual. Maggie is gaining strength, as I hear her practicing her voice with a friend in the parlor. This is sweeping day and there is much dusting and window rubbing going on within and without.

There are signs of spring all around us; trees are budding, flowers are peeping out. In Mount Morris Park birds are singing and people are moving in and out, for we see loaded furniture carts frequently pass. I suppose you, too, are rejoicing in the breaking up of winter, and Charlie is beginning boating excursions and duck shooting expeditions, if they come at this season. As John regains strength he will want to work in the garden, but I hope he will be careful; while it is well to be out of doors, fatigue is dangerous. Now I must say "farewell."

Y'rs, affectionately,

MARIA S. KENYON.

Love to all.

562 TAFT HOUSE, CORNWALL ON THE HUDSON,
July 14*th*, 1883.

Edgar K. Brown, Esq.

DEAR SIR: In reply to your communication enclosing copies of two letters written by me to Mrs. Sutton, and one to my brother, John S. Kenyon, now deceased, I would say that I do not think that they are in any manner in conflict with the testimony given by me before the United States Commissioner in New York on the first day of June, 1883.

The letter of March 25th, 1878, to Mrs. Sutton was in reply to a letter from her to me saying in substance that my brother had had an attack of paralysis. (This letter I have not been able to find and may have been destroyed by me.)

When speaking in my letter under date of March 25th, 1878, of knowing the disease of old I had reference to the fact that my father had an attack of paralysis in his sixtieth year, two years previous to his death, and my uncle, William B. Kenyon, had such an attack in his eightieth year, about five years before his death.

My brother, at the time of his attack, referred to in my letter, was in his sixty-fifth year, having been born December 20th, 1813, as appears from the record in our family Bible, and it was natural that I should, as I did, think of him at the time in connection with my father and uncle.

My mention in this letter that when my brother left the city he did not appear as strong as usual was not intended to indicate that anything serious or alarming was noticed by myself and
563 sisters, or any premonitions of sickness, but simply an appearance of fatigue and weariness.

In speaking of the kindness of Mrs. Sutton towards my brother I simply referred to the fact that, from about the year 1870 down to the time of this attack of paralysis, he had boarded with Mr. and Mrs. Sutton while in Oconomowoc, and that the relations between

them were kindly, and I was very glad he was among friends and acquaintances and not among strangers.

My anxiety for my brother induced me to offer to go to Oconomowoc and render such assistance as might be necessary in the care of him; but I received from Mrs. Sutton a caustic reply to my offer, which letter was in substance and effect that my presence in Oconomowoc would not be agreeable, and that my assistance was not needed—a letter, in fact, which satisfied me that Mrs. Sutton desired to keep my brother aloof from his nearest kin. To this letter I could not reply and all correspondence between us from that time ceased.

These two letters which I received from Mrs. Sutton I have carefully searched for, but have not been able to find.

In reference to the offer which I made to my brother to keep house for him, contained in my letter to him under date of March 23d, 1878, I will say that subsequent to the death of my brother's wife in the year 1869, with the exception of a period of few months when he resided in Tremont, he resided with our family at 307 East 124th street, New York city, while in New York; but as our accommodations were somewhat limited, and as my brother had previous to this time, and as early as the year 1872, purchased the prem-
564 ises No. 308 East 124th street, directly opposite our residence, I thought it might conduce to his comfort if this house was furnished and I or other of my sisters should keep house for him, thus enabling him, as was his pleasure, to be frequently in the society of his sisters.

Very truly yours,

MARIA S. KENYON.

565 CHARLES T. SUTTON, being duly sworn, testified as follows:

By Mr. SMITH:

Q. You live in Oconomowoc and are the husband of the plaintiff in this case, are you, Mr. Sutton?

A. I do, and I am, sir.

Q. In respect to some building going on on the Breck property, or the Breck lands, so called, and since then called "The
566 Oaks," what relationship, if any—what business relationship, if any, did you bear to the complainant in the case?

(That question is objected to: first, because the witness is the husband of the complainant and is not qualified to testify; second, it is not rebuttal, and is immaterial and irrelevant.)

A. I acted in relation to that matter as her agent—Mrs. Sutton's.

Q. Without going into particulars at this moment, just state in general what your authority in general was.

(Same objection as before.)

A. It was proposed to me that I should take the entire charge of the construction and improvement that were going on at the place. I acceded to the proposition and did so, commencing work as soon

as the place was purchased—even before the papers were passed. I went to the place by direction of Mrs. Sutton and commenced tearing down an old barn preparatory to putting up a new.

Q. Well, in general, what other work?

A. Some time after that—a short time after that—I commenced the construction of a boat-house on the place. That work was conducted by myself with the assistance of two men that I employed to help. I personally worked on both of those buildings. I continued in charge of the construction from that time until the house was closed, the last winter.

Q. Under whose authority?

A. Under the authority of Mrs. Sutton.

Q. Now, do you remember Mr. Hoge, a person who has testified here in this case?

A. I do, sir.

Q. Do you recollect the circumstances of the keys being delivered at the time that you left for New York last; and if so, what are the facts?

567 (That question is objected to, because the witness has been shown to be the husband of the complainant and is not qualified to testify in the case.)

A. On the 22d of November, the day we left Oconomowoc to go to New York, I gave the key.

Q. Let me get the year. Do you recollect it?

A. The last winter we went to New York—1881-'82—November, 1881, on the 22d of November. I gave the key on the morning of that day to Mr. Kenyon to take to the "Oaks" and give to Mr. Hoge. I was very busy—it was my intention to have gone myself, but I was very busy closing the house preparatory to leaving the city for New York. Mr. Kenyon volunteered to take the key to Mr. Hoge for me. I gave him the key at that time—on the morning of November 22, 1881.

Q. What did Mr. Hoge have to do with the matter?

(Same objection as before.)

A. I had instructed Mr. Hogey to watch the place during the winter in our absence. He had, the winter previous, had some supervision over the place to see that nothing was destroyed—nothing was out of place.

Q. Had Mr. Hoge been a workman on the place at all—done labor?

A. Yes, sir.

Q. How many days' work had he done—what work?

(Objected to as irrelevant and immaterial.)

A. He had performed various kinds of labor as helper to the masons.

Q. Well, do you recollect what length of time?

A. I employed him in October and a part of November to work

on the house in various capacities as helper to the masons; to do whatever I might direct.

Q. Who paid him?

A. I paid him, sir.

Q. Have you any evidence of it?

A. Yes, sir.

Q. Produce it.

568 (Same objection as before, and because not rebuttal and immaterial.)

(Paper produced.)

Q. Who signed that pager?

A. Albert Hoge.

Mr. SMITH: We offer in evidence in connection with the witness' testimony this receipt: "November 19, 1881, received of C. T. Sutton nine dollars, in full to date for wages. Albert Hoge."

Q. In whose handwriting is that portion of the body of the receipt which is not printed?

A. My own.

Q. The signature is made by him in person though, is it?

A. It was, sir.

Q. Now, then, I want to know whether the labor therein referred to and paid for is the same item which is included in this bill of Hoge's, at folio 1351, for the same amount, or is it different?

(Witness examines fol. 1351.)

A. This bill is dated November 7. That receipt is in payment in full to date—to November 19.

Q. That is not the question. What we want to know is, is the work there the same or is it different work? Here is a receipt on November 19, there is another bill, and each of them is for nine dollars' worth of labor, and what I want to know is, whether the labor is the same labor or is it different labor?

A. The same kind of labor; yes, sir.

Q. I don't want to know that. I want to know whether the item of nine dollars there in that bill was paid by you at this time, or is it some other nine dollars of work; that is what I want to call your attention to. You can think it over if you want. I call your attention to that item in that bill there of nine dollars. What I want to know is, whether this nine dollars, paid on the 19th of November, paid that bill or paid some other bill, if you remember. Di-

569 rect your attention to it and think it over if you wish.

A. That nine dollars paid is wages paid up to November 19, for the various kinds of work that he was doing. That was the final payment I made him; perhaps that is more significant. I took receipts from all my workmen, which may be found there, and he with others, for the final payment of wages, material, and various things of that kind.

Q. Here is an item in folio 1351 in an account rendered, as I un-

derstand, by Mr. Albert Hoge against John S. Kenyon's estate, of six days' labor at $1.50 per day. The date of the item here is November 7, 1881. What I desire to know is whether that nine-dollar item was paid by you or was not.

A. There was work performed after we left the place—one week's labor after we left the place.

Q. By Mr. Hoge?

A. By Mr. Hoge.

By Mr. HURLBUT: That was after the 19th?

A. After the 31st of November. It was after the 19th.

Mr. SMITH: Q. This receipt reads: "In full to date for wages." Now I will ask you whether that receipt is according to the fact; whether you did then pay him in full for all work previously done to that date?

A. I did. I did not fully understand your question.

Cross-examination:

By Mr. JENKINS: Q. Mr. Sutton, what work was done on that place before the deed of the property was made to Mr. Kenyon?

A. To the best of my recollection an old barn was torn down and removed; a boat-house was partly, if not completely, constructed.

Q. Who did the work in tearing down the old barn?

A. I did personally, with the assistance of two others that I employed.

570 Q. Mention them.

A. One was Karl Wichman; the other was a Mr. Bloedel; I don't know his first name.

Q. When was that work done, what month and what year, and what part of the month?

A. That work was done in September, 1880.

Q. Had there then been an executed contract for the sale of that property to Mr. Kenyon?

A. To the best of my knowledge there had.

Q. You stated that you paid these workmen; did you receive money from Mr. Kenyon to pay for material and work?

A. I received a check from Mr. Kenyon. Shall I state the amount?

Q. Just answer my question.

A. I received a check. Shall I state the history of the transaction?

Q. You did receive money?

A. I received a check.

Q. With the proceeds of which you paid workmen and for material?

A. Yes, sir.

Q. And all of the work and material furnished to that house was paid for by Mr. Kenyon, in fact. Was it not paid for with his money?

A. It was paid with money furnished by a check, furnished by Mr. Kenyon; yes, sir.

Q. When did you and Mrs. Sutton move your household effects from the house on Main street to the Oaks and take up your resi-

dence at the Oaks?

A. A part of the household furniture, some agricultural and some mechanical tools were moved away in the fall previous to our leaving for New York the last time.

Q. When did you move your household effects from Main street and take up your residence at the Oaks?

A. In the spring of 1882.

Q. After the death of Mr. Kenyon?

A. After the death of Mr. Kenyon.

Q. Did Mr. Kenyon speak to you about superintending that work there?

A. No, sir.

571 Q. Did you propose, after the death of Mr. Kenyon, to send in a bill for your services in superintending that work against the estate of Mr. Kenyon?

A. No, sir.

Q. You say you gave the key of the house to Mr. Kenyon to deliver to Mr. Hoge; where was that key kept?

A. In my pocket usually.

Q. Where were you and Mr. Kenyon when you delivered it to Mr. Kenyon?

A. In our house on Main street?

Q. And where was Mr. Kenyon and Mr. Hoge when Mr. Kenyon delivered it to Mr. Hoge?

A. I cannot say from personal observation. The key was given to Mr. Kenyon to give to Mr. Hoge.

Q. Where did you understand that Mr. Hoge and Mr. Kenyon were when the key was delivered to Mr. Hoge?

A. I presume at the place—the Oaks.

Q. Mr. Hoge was to watch, and, as you understand it, did watch that place from the time that you and Mrs. Sutton and Mr. Kenyon went to New York until you and Mrs. Kenyon (Sutton) returned?

A. That was his instructions.

Q. And it was expected that Mr. Kenyon and yourself and wife, upon returning from New York, should take up your residence at the Oaks?

A. Yes, sir.

Q. And after you left for New York, as you have testified and understood it, there was work done there by Mr. Hoge?

A. Yes, sir.

Q. Cleaning up?

A. Yes, sir.

Q. Do you remember, after your return from New York in 1882, advising or directing Mr. Hoge to send in a bill for his services in watching that place during the winter against the estate of Mr. Kenyon?

A. I have no clear recollection of advising him especially. There were a number came to me to know what disposition
572 they should make of their claims; I may have told Mr. Hoge at the time; it is not clear in my mind.

Q. Told him what?

A. To make his claim against the estate.

Q. You say that you told Mr. Hoge, previous to the delivery of the key to him, to watch that place during your absence?

A. Yes, sir.

Q. Were you and Mr. Kenyon together when that was told?

A. I have no recollection of Mr. Kenyon's being present. Shall I explain fully?

Q. Have you no recollection?

A. I have no recollection of Mr. Kenyon being present.

Q. Was it at the Oaks that you told him that?

A. Yes, sir.

Redirect examination by Mr. SMITH:

Q. You spoke of the work being paid for by Mr. Kenyon; does that include the work that you personally did there at the Oaks?

A. I think I did not say the work was paid for by Mr. Kenyon; the money was furnished.

Q. What I want to know is whether the work done by you was paid for out of money furnished by Mr. Kenyon—the work which you individually did; was that work paid for by cash furnished by Mr. Kenyon?

A. No, sir.

Q. Was it paid for by Mr. Kenyon in any manner?

A. No, sir.

Q. Or out of any of his moneys?

A. No, sir.

Q. Neither the superintending nor the personal labor?

A. No, sir.

Q. I understood you that you removed part of your furniture in the fall to the Oaks and the remainder of it in the spring, after your return from New York?

A. Yes, sir.

573 Mr. Jenkins desires you to state what furniture was removed in the fall.

A. Some household furniture, some tools—

Q. What household furniture?

A. There were stoves, there were chairs, and there was a table. I think—I will not be positive—I think there was a carpet; as to that I am not certain. There were tools consisting of agricultural tools of some kinds and mechanical tools of my own that I had used at the house on Main street.

Q. Unless you think of anything more in that connection you need not say anything more.

A. I had moved also my boats—several boats—that were placed in the boat-house in the fall at the same time—about the same time.

Q. You don't think of anything more that you want to say in that connection?

A. No.

Q. That is all.

574 And afterwards, to wit, on the one hundred and second day of said term, to wit, on the 30th day of May, A. D. 1885, the same judges being present, the following proceedings were had, to wit:

Decree.

SARAH S. SUTTON, Complainant,
vs.
ERASTUS F. BROWN & FRANCIS A. KENYON, as executors of the will of John S. Kenyon, deceased, and trustees of his estate under the will, and James Kenyon, Maria S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline B. Brown, & Francis A. Kenyon, Defendants. } In Equity.

This cause having been heard at this term upon the original pleadings as served and filed in the circuit court of the State of Wisconsin, for the county of Waukesha, the said cause being at issue upon the complaint taken and treated as a bill of complaint, and the answer of the defendants, Erastus F. Brown and Francis A. Kenyon, as executors of the will of John S. Kenyon, deceased, and trustees of his estate under said will, Messrs. Hurlbut & Van Alstine and Winfield Smith, having been heard as counsel for the
575 complainant, and Messrs. Jenkins, Winkler & Smith as counsel for the said defendants, and the depositions of the witnesses examined for the said complainant and for the said defendants having been produced and read to the court upon such hearing; and the motion of the complainant for leave to file a bill of complaint in lieu of the original complaint coming on to be heard and being opposed by the said defendants the same is hereby overruled, and leave to file such bill denied; and the motion of the said complainant that the depositions of Charles T. Sutton and Joseph Scott may be allowed and read having been also submitted, the said motion is granted as to the deposition of the said Joseph Scott and as to so much of the deposition of the said Charles T. Sutton as tends to prove that he was the authorized agent of the complainant in respect to the matters therein mentioned and as tends to show the acts done by him as such authorized agent of the complainant.

And the motion of the complainant, that her deposition be ordered to be read, is denied, and the motion of the defendants, that her deposition be expunged is granted and allowed; and the court being now well and sufficiently advised, and it appearing to the court from the said pleadings and proofs that the said deceased
576 John S. Kenyon did, in the month of August, in the year 1880, enter into the agreement set forth in the said bill of complaint whereby he promised to and agreed with her at the city of Oconomowoc and the State of Wisconsin for the consideration set out in the said bill of complaint of the services previously rendered by the complainant and the services agreed by her thereafter to be rendered to the said John S. Kenyon, that he would purchase and convey to the complainant the premises hereinafter described, upon

which premises the said John S. Kenyon at the same time and place did for the same consideration further agree with the complainant to build and construct a dwelling-house thereon and to make other improvements for the benefit of the said complainant as set forth in the said bill of complaint.

And it further appearing to the court that the said John S. Kenyon, in pursuance of the said agreement, did purchase the said land and did construct in part the said dwelling-house, but died on the twenty-third day of January, 1882, before conveying the said premises to the complainant and before the completion of the said dwelling-house and improvements, and it further appearing to the court
577 that the said agreement was valid and to the extent hereinafter adjudged and decreed ought to be performed; and it appearing that the defendants, Erastus F. Brown and Francis A. Kenyon, are executors of the last will of the said deceased and are also by virtue thereof the holders in fee-simple of the title to the said lands and premises in trust for the purposes named in the said will and for the discharge of the said agreement and obligation of the said John S. Kenyon:

Now, it is considered and decreed and the court doth order, adjudge and decree that the said defendants, Erastus F. Brown and Francis A. Kenyon, as executors and trustees as aforesaid, do make, execute, and acknowledge a quit-claim deed of conveyance and deliver the same to the complainant, Sarah S. Sutton, in such manner that the same may be recorded in the office of the register of deeds in the said county of Waukesha, which conveyance shall be so executed and delivered within sixty days from the date of this decree, and shall in proper form and by apt words grant and convey to the said Sarah S. Sutton, her heirs, executors, administrators, and assigns, for her and their use and benefit forever, all their interest, and all
578 the right, title, and interest which the said John S. Kenyon had in the said premises at the time of his death on the said 23rd day of January, A. D. 1882.

And it is further ordered, adjudged, and decreed that the said complainant be, and is, entitled to the possession, and to the rents and profits, of the said premises since the fourth day of October, 1880, and until the execution and delivery of the conveyance decreed as above to be made to her.

And it is further ordered and decreed that the complainant, Sarah S. Sutton, do have and recover of and from the defendants, Erastus F. Brown and Francis A. Kenyon, executors and trustees as aforesaid, her costs in this cause, taxed at the sum of eight hundred and one dollars and fifty-five cents, which the said defendants shall pay out of the estate of the said John S. Kenyon, deceased, which came to the said defendants as such executors and trustees.

And it is further ordered and decreed that the defendants, and each of them, and all persons claiming, or to claim, under them, or under any of them, since the commencement of this cause, be, and are hereby, perpetually enjoined and restrained from setting up and asserting any title, right, or claim in and to the said premises, or any part thereof, or to the possession thereof, against the complain-

ant, or her heirs, or any person, claiming title under her or
579 them, and from instituting or prosecuting any action to recover the said premises, or any part thereof, or interest therein.

And it is further ordered and decreed that so much of the prayer of the bill of complaint as prays that the defendants, Erastus F. Brown and Francis A. Kenyon, as executors aforesaid, complete the house in process of erection and construction on said premises at the time of the death of said John S. Kenyon in such time as the court shall deem reasonable, and, in default thereof, that the complainant have judgment against them for the sum of four thousand dollars, or for such sum as will be sufficient to complete the said house according to the plans and specifications thereof, be, and the same is, denied.

The premises and real estate hereinbefore mentioned, and which are subject to this decree, are situated in the city of Oconomowoc, in the county of Waukesha and State of Wisconsin, and are bounded and described as follows:

Commencing in the center of the highway heretofore known as the Milwaukee and Watertown plank-road, at a point where the north and south quarter line of section numbered thirty-two (32), of town numbered eight (8) north, of range numbered seventeen (17) east, in said county and State, crosses the said highway,
580 and witnessed by "sugar maple" three inches south nine and one-half ($9\frac{1}{2}$) degrees east forty-four links, and by another "sugar maple" three (3) inches south eighty-three (83) degrees west ninety-five links, and by "cherry" nine (9) inches north seventy-six and one-fourth ($76\frac{1}{4}$) degrees east two hundred and twenty-eight and one-half ($228\frac{1}{2}$) links; thence from said point thus witnessed north at variation of five (5) degrees fifty-five (55) minutes east, so as to strike at about ten (10) links west of a "hickory" about six (6) inches; thence on same course twenty-one (21) chains and ten (10) links to the bank of Lake La Belle, about eight (8) links west of an "elm" stump thirty (30) inches in diameter, said line supposed to be the north and south quarter line of said section numbered thirty-two (32) aforesaid; thence west in measurement five (5) chains (but land hereby conveyed to be bounded by La Belle Lake); thence about south eight (8) degrees west along the bank of La Belle Lake to a "black oak" marked by an axe only; thence south about three and one-half ($3\frac{1}{2}$) degrees east about ten (10) chains to center of said highway (which center is witnessed by a "hickory" five (5)
581 inches north seventy-six and one-half ($76\frac{1}{2}$) degrees east one hundred and one (101) links, and by a "sugar maple" three (3) inches south eleven and ond one half ($11\frac{1}{2}$) degrees east fifty-seven (57) links; thence south sixty-one and one-half ($61\frac{1}{2}$) degrees east, in center of said highway, six (6) chains and twelve (12) links to place of beginning, containing eleven and one-seventh ($11\frac{1}{7}$) acres of land, more or less.

Excepting and reserving therefrom the following piece or parcel of land conveyed by said Samuel Breck & wife to Jacob Johnson by deed dated November 1st, 1869, and recorded in register of deeds'

office for Waukesha county, Wisconsin, in volume forty-nine (49) of deeds, page page four hundred and twenty (420), described as follows: A parcel of land in the east one-half ($\frac{1}{2}$) of the west one-half ($\frac{1}{2}$) of section numbered thirty-two (32), township eight (8) north, range seventeen (17) east, in said Waukesha county, Wisconsin, commencing in the center of the highway heretofore known as the plank-road, and two (2) rods west of the north and south one-fourth ($\frac{1}{4}$) line of said section; thence north parallel with said one-quarter ($\frac{1}{4}$) line four and eighty-eight one hundredths ($4\frac{88}{100}$) chains, measured perpendicularly, from and to the center line of said highway,
582 thence north sixty and two-thirds ($60\frac{2}{3}$) degrees west parallel to said highway six and thirty-seven one hundredths chains ($6\frac{37}{100}$) to the west line of the first above-described lands; thence south three and one-half ($3\frac{1}{2}$) degrees east to center of said highway; thence south sixty and two-thirds ($60\frac{2}{3}$) degrees east five and ninety-one one-hundredths chains to the place of beginning, being three (3) acres more or less.

CHAS E. DYER,
Judge.

SEPTEMBER 28, 1885.

This day came the defendants, Erastus F. Brown and Francis A. Kenyon, executors, &c., and on their petition herein filed prayed an appeal to the Supreme Court of the United States, which petition is as follows, to wit:

Petition for Appeal.

Circuit Court of the United States for the Eastern District of Wisconsin. In Equity.

SARAH S. SUTTON, Complainant,
vs.
ERASTUS F. BROWN and FRANCIS A. KENYON, Executors of the last will of John S. Kenyon, deceased, and trustees of his estate under the will, and James Kenyon, Mary S. Kenyon, Elizabeth B. Kenyon, Abigail B. Clark, Caroline P. Brown, and Francis Kenyon, Defendants.

583 To the honorable the circuit court of the United States:

The petition of appeal of Erastus F. Brown and Francis A. Kenyon, executors of the last will of John S. Kenyon, deceased, and trustees of his estate under the will, defendants in the above-entitled cause, respectfully showeth:

That the said Sarah S. Sutton having filed her original bill against these appellants with the other defendants above named, and these defendants having answered thereto and testimony having been taken, said cause was heard upon the pleadings and proofs, and a final decree therein rendered on the 30th day of May, 1885, by which decree there is granted to the said Sarah S. Sutton, the complainant, certain relief claimed against these appellants; that by

said decree these appellants are required to convey to said complainant certain real estate therein described with the appurtenances thereto belonging; that the value of said real estate exceeds the sum of five thousand dollars, and that the matter in dispute in said cause, exclusive of costs, exceeds the sum of five thousand dollars in value.

Wherefore these appellants appeal from the said decree of said circuit court of the United States, and respectfully pray that said decree, and said bill and answer, and all the pleadings, evi-
584 dence, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the Supreme Court will proceed to hear the said cause anew, and that the said decree of said circuit court may be reversed, and a decree made dismissing said bill of complaint or such decree as to the Supreme Court shall seem just.

Dated July 21st, 1885.

JENKINS, WINKLER & SMITH,
Solicitors for Defendants.

EASTERN DISTRICT OF WISCONSIN, *ss:*

F. C. Winkler, being duly sworn, says that he is one of the attorneys of the appellants named in the foregoing petition of appeal; that neither of said appellants reside or are within the State of Wisconsin; that this deponent is acquainted with the facts and circumstances of the said cause mentioned in the foregoing petition, and knows all the facts stated in said petition to be true.

F. C. WINKLER.

Subscribed and sworn to before me, this 21st day of July, A. D. 1885.

[SEAL.] CHAS. E. WILD,
Notary Public, Milwaukee County, Wisconsin.

Allowance of Appeal.

Whereupon it is ordered by the court that the said appeal be
585 and hereby is, allowed upon said defendants giving bond, with security, in the sum of one thousand dollars, to be approved, conditioned to prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good.

And the same day (September 28, 1885) came the said defendants, by their solicitors, and filed their appeal bond in the penalty of one thousand dollars, conditioned as aforesaid, and deposited in court one thousand dollars, to remain in lieu of sureties on said bond, which appeal bond is as follows:

Appeal Bond.

Know all men by these presents that we, Erastus F. Brown and Francis A. Kenyon, as executors of the will of John S. Kenyon, deceased, and trustees of his estate under the will, are held and firmly bound unto Sarah S. Sutton, of the county of Waukesha, in the State of Wisconsin, in the full and just sum of one thousand dollars,

to be paid to the said Sarah S. Sutton, her certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves and our successors in office, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of July, in the
586 year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Wisconsin, in equity, in a suit depending in said court between Sarah S. Sutton, complainant, and Erastus F. Brown and Francis A. Kenyon, executors of the last will of John S. Kenyon, deceased, and other defendants, a final decree in favor of said complainant was rendered against the said Erastus F. Brown and Francis A. Kenyon, executors as aforesaid, and the said Erastus F. Brown and Francis A. Kenyon, executors as aforesaid, having appealed from said final decree to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation, directed to the said complainant, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Erastus F. Brown and Francis A. Kenyon, executors as aforesaid, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ERASTUS F. BROWN, [SEAL.]
As Executor and Trustee est. John S. Kenyon, dec'd.
587 F. A. KENYON, [SEAL.]
As Executor & Trustee estate John S. Kenyon, dec'd.

Sealed and delivered in presence of—
J. H. V. ARNOLD,
JOS. F. ARNOLD,
As to E. F. Brown.
J. A. HECK,
C. J. WALTON,
As to A. F. Kenyon.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on the seventh day of September, in the year eighteen hundred and eighty-five, before the subscriber, a commissioner in and for said State, appointed by the Governor of the State of Wisconsin to take the acknowledgment of proofs of the execution of any deed or other conveyance or lease of any lands lying in the State of Wisconsin, and of any contract, letter of attorney, or other writing, under seal or not, to administer oaths and affirmations, and to take and certify depositions to be used and recorded in the State of Wisconsin, appeared Erastus F. Brown, an executor of the will of John S. Kenyon, deceased, and trustee of his estate under said will, described in, and who executed the foregoing instrument of writing between him, as one of the parties thereto, and Sarah S.

Sutton, the other party thereto, and the said Erastus F. Brown acknowledged that he executed the said instrument, as such executor and trustee, freely for the purposes therein stated; and I further certify that the person who made the said acknowledgment
588 is known to be the person described in and who executed the said instrument.

Given under my hand and official seal, at the city of New York aforesaid, the day and year above written.

[SEAL.] JNO. H. V. ARNOLD,

A Commissioner of Deeds for the State of Wisconsin in New York, Appointed by the Governor of Wisconsin to Administer Oaths, Affirmations, &c.

STATE OF PENNSYLVANIA, }
County of Westmoreland, } *ss:*

Be it remembered that on the 12th day of September, A. D. 1885, personally appeared before me, the subscriber, a notary public, residing in the borough of Latrobe, county & State aforesaid, F. A. Kenyon, an executor of the will of John S. Kenyon, decased, and trustee of his estate under said will, who signed & sealed the foregoing instrument of writing and acknowledged it to be his act and deed, and desired that the same might be recorded as such; and I further certify that the person who made the said acknowledgment is known to me to be the person described in and who executed the said instrument.

Witness my hand and official seal, the day and year above written.

[SEAL.] JNO. H. ROCK,

Notary Public.

589 *Order Approving Bond, &c.*

And same day (September 28, 1885), it appearing by the records and files herein that the defendants, Erastus F. Brown and Francis A. Kenyon, executors of the last will of John S. Kenyon, decased, have appealed to the Supreme Court of the United States from the decree entered in this court in the above-entitled action, and have given a bond to the said complainant that they will prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, and this court deeming it advisable, in lieu of sureties on such bond, to take and accept one thousand dollars, this day deposited by said appellants with the clerk of this court as security that said appellants will perform the conditions of their said obligation:

Now, therefore, it is ordered by the court now here that the said bond be, and hereby stand, approved, and that the said sum of one thousand dollars remain in this court as security for the performance by the said Erastus F. Brown and Francis A. Kenyon, executors as aforesaid, of the conditions of said bond until their said appeal shall have been prosecuted to effect and the said obligation becomes void.

Whereupon a citation issued.

590 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a full and complete transcript of the record in case of Sarah S. Sutton *vs.* Erastus F. Brown *et al.*, executors, &c., in equity, except the plans of the new building, referred to in the depositions and introduced in evidence by the plaintiff, as appears on page 199 of the record, which original plans are sent herewith.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this first day of October, in the year of our Lord one thousand eight hundred and eighty-five and of the Independence of the United States the 110th.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

EDWARD KURTZ, *Clerk.*

591 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] To Sarah S. Sutton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal in the circuit court of the United States for the eastern district of Wisconsin, wherein Erastus F. Brown and Francis A. Kenyon, executors of the last will of John S. Kenyon, deceased, and trustees of his estate under the will, are appellants, and you are appellee, to show cause, if any there be, why the decree passed against the said Erastus F. Brown and Francis A. Kenyon, executors, &c., should not be reversed and speedy justice done to the parties in that behalf.

Witness the Hon. Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in said district, this 28th day of September, A. D. 1885, and of the Independence of the United States the 110th.

CHAS. E. DYER, *Judge.*

We accept service of the above citation this 30th day of September, A. D. 1885.

HURLBUT & VAN ALSTINE,
Solicitors for Complainant.

Endorsed on cover: No. 1053. E. Wisconsin C. C. U. S. Erastus F. Brown and Francis A. Kenyon, executors of the last will of John S. Kenyon, deceased, and trustees of his estate under the will, appellants, *v.* Sarah S. Sutton. Filed October 10, 1885.

Office Supreme Court U. S.
FILED.
NOV 16 1893
JAMES H. McKENNEY,
CLERK.

EVENING POST JOB PRINTING OFFICE—N. Y.

Supreme Court of the United States.

ERASTUS F. BROWN and FRANCIS A. KENYON, as Executors of the Last Will and Testament of JOHN S. KENYON, deceased, and Trustees of the Estate under the Will,
Appellants,

AGAINST

SARAH S. SUTTON,
Respondent.

Appellants' Brief.

Statement of Facts.

The appeal in the above entitled action is taken from the judgment of the Circuit Court of the United States for the Eastern District of Wisconsin.

Which judgment was in favor of the complainant therein, Sarah S. Sutton, decreeing specific performance of an alleged verbal contract for the conveyance of land, entered into between the complainant and the defendant's testator John S. Kenyon.

John S. Kenyon, a retired merchant of some considerable wealth was, in his lifetime, a resident of the City and County of New York.

In the year 1872, his wife, who for some years had been an invalid, departed this life at Tremont, a suburb of said city. Previous to the death of Mrs. Kenyon, Mrs. Sutton the complainant herein, appears to have been a guest in Mr. Kenyon's family on a number of occasions, enjoying such privileges as are usually accorded to guests, but performing no labors whatsoever in Mrs. Kenyon's sick-room.

Record, pages 257 to 265.

At this time Mrs. Kenyon's illness was of such a character as to confine her to her room, and to require constant care and attention. During all this long and protracted illness of his wife Mr. Kenyon was her sole nurse and attendant, performing for her all the services and duties devolving upon such occupation.

Record, pages 257 to 265.

Subsequent to the death of his wife, in the year 1872, Mr. Kenyon in company with Mr. and Mrs. Sutton (the complainant herein and her husband), boarded in the family of George F. Westover, the brother-in-law of the complainant and witness and counsel in this action, paying the weekly board of ten dollars to Mr. Westover. At this time Mr. Westover resided at the Village of Oconomowoc, Wisconsin.

Record, pages ~~39 and 42~~. 22 x 31 & 32

Mr. Kenyon and Mr. and Mrs. Sutton so resided with Mr. Westover from this time until Mr. Westover's removal to Chicago, in the year 1874.

Record, page ~~37~~ 32.

In the month of April, 1874, Mr. Kenyon purchased a small residence on Main street in said village for the sum of $2,650, into which Mr. Kenyon and Mr. and Mrs. Sutton removed. From this time until the year of his death,

Mr. Kenyon resided in this Main street house during the summer months.

Record, page 33

During all the period from the time that Mr. Kenyon boarded with Mr. Westover at Oconomowoc down to the year 1879, he always left that village in the early fall and resided with his sisters at No. 307 East One Hundred and Twenty-fourth street, in the City of New York, until the following summer. It was also his custom to spend several weeks in this city during the months of July and August.

Record, pages ~~94 and 95.~~ 238) 239 × 84

Until the winter of 1879–80 neither Mr. nor Mrs. Sutton accompanied him in any of these journeys to or from New York, they being domiciled at Oconomowoc.

Record, page 34.

In the year 1879 Mr. Kenyon resumed housekeeping in the City of New York, his residence being directly across the street from that of his sisters where he had previously resided. The reason for this change being that the home of his sisters was not sufficiently large to accommodate both them and their sister's family, and allow Mr. Kenyon accommodations at all commodious.

Record, page 255.

From this time on to the year of his death, in the winter of 1882, the Suttons accompanied Mr. Kenyon to the city in the fall returning with him in the spring, residing with him in his city house, living upon his bounty, neither of them paying any board.

Record, page ~~94~~ 84

The residence which Mr. Kenyon purchased on Main street in the Village of Oconomowoc was a small cottage as will be seen from a full description thereof at Record, pages 206–207.

It was therefore but natural that Mr. Kenyon, being a man of wealth, should desire a more commodious residence. We therefore find him in the month of September, 1880, purchasing from Samuel Brick and others a plot of land including eleven acres, on the shore of Lake La Belle, in said village, and commencing in the fall of the year 1881 the erection of a house more suitable to his means and station in life.

Record, page ~~28~~ 345

The claim of the complainant herein is that Mr. Kenyon being in infirm health and an invalid, and being in need of constant care and attention, made two oral agreements with her to the following effect:

The first in the year 1872 at Oconomouock, Wisconsin, that in consideration of her care and society Mr. Kenyon agreed that "she should be well provided for."

The second alleged oral contract made in the year 1880 at the same place provided that in consideration of the plaintiff's care and society Mr. Kenyon agreed to purchase certain lands and premises in Oconomouock, and to erect thereupon a substantial dwelling, and upon the completion thereof convey the same to the complainant in fee.

Record, page 2.

The complainant herein claims that the premises above referred to as having been purchased from Samuel Brick and others in the year 1880, and the beginning thereafter of the building of a residence thereupon was in part performance of this alleged parol agreement, and she demands in this suit that these appellants, the executors and trustees, under the will of John S. Kenyon, deceased, shall complete such structure, and thereupon convey said lands and the improvements thereon erected to the complainant in specific performance of said parol agreement with defendant's testator.

Record, pages 2 and 3.

The defendants on their part deny the existence of any such parol agreement, and allege that such prem-

ises were purchased by Mr. Kenyon, and the building begun thereupon solely for Mr. Kenyon's own benefit and ownership. With the probable expectation on his part that Mr. and Mrs. Sutton should in the future as in the past live under his roof, receiving of his bounty and enjoying the privileges which his wealth placed within their reach.

Record, pages 10 and 11.

The appellants respectfully assign as error that the Circuit Court erred upon the evidence appearing in the printed record, in giving judgment in favor of the complainant decreeing specific performance. And for refusing to dismiss the complaint for insufficiency of proof to establish the complainant's alleged parol agreement.

First Point.

In order to give probable color to the existence of such a contract, the complainant has endeavored to show that John S. Kenyon was an invalid in such a precarious state of health as to be in need of constant care and attention.

Upon the question of Mr. Kenyon's health we would refer the Court to the testimony of Mr. C. H. Van Alstine, *one of the attorneys for the complainant*, who testifies as follows:

"Q. How often did you see Mr. Kenyon about the City of Oconomowock in the years 1879–1880 and 1881.

A. I saw him very frequently, perhaps two or three times a week.

Q. What was he doing?

A. I have seen him walking to church; I have seen him sail on the lake in the summer time.

Q. Did, sir, you see him walking anywhere but to church in 1880 and 1881.

A. O yes, I have seen him walking about town.

Q. And when you speak of his sailing do you mean rowing or sailing?

A. I have seen him both rowing and sailing on the lake. * * *

Q. Did you see him on the Bricks place during the erection of the house?

A. I have seen him there a few times.

Q. Do you know how he came there?

A. Sometimes he used to come there with a horse and carriage. Well, I suppose he came on the latter. * * * I went over with him once.

Q. In a boat?

A. Yes, sir.

Q. What is the distance between Mrs. Sutton's house on Main street and the new house on the lake.

A. I think about three-fourths of a mile.

Q. When you went over with him from the house on Main street to the Brick's place, who did the rowing?

A. We sailed over.

Q. Who managed the boat?

A. I attended to the tacking * * * he did the sailing of the boat.

Q. He was amusing himself about as any gentleman resorting to Oconomowock in the summer season amuses himself; was he not fishing and sailing and riding?

A. Yes, sir; he would fish and sail and ride, but not to the excess that some people do. * * *

Q. He used to attend to business?

A. Yes, sir."

Record, pages 314 and 315.

We thus see what was Mr. Kenyon's apparent health, amusements and occupations in the City of Oconomowock for the three years preceding his death.

The following is the uncontradicted testimony as to Mr. Kenyon's health and habits in the City of New York:

CORNELIUS VAN VOORHIS, an old friend of Mr. Kenyon's, having known him intimately from the year 1830, testifies:

"During the time that I have known Mr. Kenyon, even from the commencement of it. * * * * I do not know a man among all my acquaintances whom I considered enjoyed better health than John S. Kenyon."

Record, pages 292 to 298.

Other entirely disinterested witnesses testify to the same effect:

Chares A. Yost, Record, pages 227 to 233.
Elisha Selchow, " " 233 " 238.
Henry P. McG[illegible] " 286 " 297.
Samuel B. Kenyon, " " 210 " 217.
Samuel K. Virgin, " " 279 " 280.

Such being the facts as to Mr. Kenyon's condition of health at the time when the alleged parol agreement was entered into, it is evident that there was not probable cause for the making of such a contract on the part of Mr. Kenyon. He needed no attendance. Was a self-contained active man, attending personally to his business and affairs. Employing his leisure time in Oconomowock in recreations and amusements, such as all summer residents in that city participate in.

The attention of this Court is called to the testimony of various of the complainant's witnesses, upon which testimony she relies in part to support the alleged verbal and parol agreement claimed to have been entered into between herself and Mr. Kenyon.

Namely, the evidence of—

David W. Small, Record, pages 44 to 53.
Louise C. Williams, " " 61 " 67.
Jacob Van Horn, " " 71 " 76.
Mrs. D. W. Small, " " 76 " 80.
Harvey V. Anderson, " " 81 " 89.
Clarence Peck, " " 117 " 122.
Ferdinand Peck, " " 122 " 125.
H. H. Shufelt, " " 125 " 128.

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From the testimony of these witnesses, it would appear that if Mr. Kenyon had it in mind to convey the property, it was in the nature of a mere gift, and not in fulfillment of a contract.

But the evidence makes it entirely uncertain whether he intended such gift for Charles T. Sutton, Sarah S. Sutton (the complainant), or for them both, jointly.

For he speaks of the place as being intended for Mrs. Sutton, for Mr. Sutton, and for both Mr. and Mrs. Sutton, referring to them jointly as "the children."

By reference to the testimony of the above witnesses, called to prove this contract by the complainant, that on numerous occasions Mr. Kenyon so expressed himself. And for the purposes of this action, it might as well have been claimed by Mr. Sutton as by Mrs. Sutton, or by them both jointly.

The undisputed testimony of the witness, Albert Hodge, clearly shows that Mr. Kenyon did not give to the complainant the full control and possession of the premises in controversy. For the very last act of Mr. Kenyon, before leaving Oconomowock for New York, where he shortly after died, was an exercise of control and ownership which cannot be reconciled with the claim made by the complainant, that possession had previously been given to her, ~~but~~ and that under it she had exercised undisputed control.

There was no divesting by Mr. Kenyon of his possession of the place. From the testimony of Mr. Hodge and others, Mr. Kenyon was at the place daily, supervising, overlooking and working upon the place, with the tools placed there; and from the testimony of Mr. Hodge it appears that Mr. Kenyon was the last one in the family who left the place before his death. He locked the doors; he personally gave the keys to Mr. Hodge; he employed him to take charge of it during his absence; promised to pay him for it; and the bill for that service, after Mr. Kenyon's death, at the suggestion of complainant's husband, was presented to Mr. Kenyon's representatives and subsequently paid the executors named in his will.

Record, pages 333 to 337.

as bearing upon the alleged Contract see also.
Record pages 298 to 300

Second Point.

Within well settled principles of law, we submit that nothing disclosed by the testimony either establishes such a contract between the complainant and Mr. Kenyon, nor any such part performance thereof as will take the case from without the statute; nor any such equity as should incline the Court to overbear the statute and grant the relief sought. Courts of equity proceed upon the ground that it would be against conscience to suffer one who had entered and expended his money on the faith of a parol agreement, to be treated as a trespasser; and for the other party, in fraud of his engagement, though verbal, to enjoy of the advantage of the money laid out. The tendency of modern decisions has been to restrict rather than to extend the class of cases coming within the rule. A mere breach of a parol promise will not make a case for the interference of the Chancellor; that a party who clalms such interference has the burden of proof thrown on him; that he knows that the law requires written evidence of such contracts in order to their validity; that he has acted with great negligence and folly who has paid his money without getting his deeds; that when he requests the Court to interfere for him, and save him from the consequences of his own disregard of the law, he should be held rigidly to *full*, *satisfactory*, and *indubitable* proof.

First.—Of the contract and of its terms. Such proof must be clear, definite, and conclusive, and must show a contract, leaving no *jus deliberandi* or *locus penitentiæ*. It cannot be made out by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated. Testimony, therefore, impossible to be contradicted.

SECOND.—That the consideration has been paid or tendered. But the mere payment of the price in part or in whole, will not of itself be sufficient for the interference of a court of equity, the party having a sufficient remedy at law to recover back the money.

THIRD.—Such a part performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a Court of Law.

FOURTH.—That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession.

With respect to the possession, it is also to be observed that the possession which must accompany the parol agreement, to save it from the statute, must be *open, notorious, exclusive* and *continued.*

Purcell *vs.* Minor, 4 Wallace, 513.
Williams *vs.* Morris, 95 U. S., 444 – 456
Brown on Frauds, Sec. 472 to 474, 485.
Browdy *vs.* Browdy, 7 Barr., 157.
Blakeslee *vs.* Blakeslee, 22 Penn., 237.
Moore *vs.* Small, 7 Harr., 461.
Haslet *vs.* Haslet, 6 Watts, 464.
Chadwick *vs.* Phelps, 35 Penn., 305.
Washabough *vs.* Entriken, 36 Penn., 513.
Allen's Estate, 1 Watts, 383.
Johnson *vs.* Glancy, 4 Blackf., 94.
Frey *vs.* Shepler, 7 Barr., 91.
Blanchard *vs.* McDougal, 6 Wis., 167.
Knoll *vs.* Harvey, 19 Wis., 99.
Detrick *vs.* Sharrar, 95 Penn. St., 521.
Smith *vs.* Finch, 8 Wisconsin Rep., 245.
Littlefield *vs.* Littlefield, 51 Wisconsin Rep., page 23.
Tieman *vs.* Gilney, 24 Wisconsin, page 190.

Blanchford *vs.* McDougal, 6 Wisconsin Rep., 167.
Colson *vs.* Thompson, 2 Wheaton Rep., 336.
Neale *vs.* Neale, 9 Wallace, page 1.

This possession means a change of possession from the one contracting party to the other; the giving up of possession by the one, and the assumption of possession by the other. This is the exclusive possession which the law requires. It does not mean a possession by both, concurrent possession for a common purpose; but an absolute divesting of possession by the one, and exclusive assumption of possession by the other.

The principle is the same as in cases of gift *inter vivos*. The declaration of an intention to give is not a gift. The donor must be divested of, and the donee invested with, the rights of property. The indispensable essentials are a delivery to the donee and loss of dominion by the donor (Geary *vs.* Page, 9 Bosworth, 297).

Nor would an equity arise from the naked delivery of possession. There must be some part performance accompanying the possession, like expenditure of money in improvements, so that a court of equity can see that not to execute the parol agreement would be to permit the perpetration of a fraud upon the party.

Within these principles of law, so well settled as not to require elaboration here, we respectfully submit that the evidence fails wholly to establish the contract, or possession under it. It shows, at most, that Mr. Kenyon had in contemplation the construction of a house upon the Breck place, where he might live during his life with Mr. and Mrs. Sutton ; and a possible intention that after his death the property should go to Mr. and Mrs. Sutton, or to one of them. The evidence in support of the complainant's contention comes within the ban of the Supreme Court of the United States, being wholly made up of conversations to strangers to the transaction. That Mr. Kenyon had made a contract by which he was absolutely and equitably

bound to convey that property, is not only unproven, but is against the conceded facts established by the defense.

On the first of January, 1882, Mr. Kenyon, with his own hand, makes an inventory of his estate. He places this property in that inventory *as his own.*

He left Oconomowoc on the 22d of November, arriving in New York not later than the 27th. He died January 23d, 1882. On the 1st of January he made the inventory of his estate, including therein the pieces of property as part of his estate.

Record, page 255 and 256.

Such conduct is stronger to point the truth than the uncertain recollection of strangers as to conversations in respect to matters in which they have no concern. In this connection, we refer the Court to the following cases:

Semmes *vs.* Worthington, 38 Maryland, 298.
Shelhammer *vs.* Ashbaugh, 83 Penn. St., 24.
Gerry *vs.* Howe, 130 Mass., 350.
Chalker *vs.* Chalker, 5 Redfield, 480.
Hoar *vs.* Hoar, Idem., 637.
Alderson *vs.* Maddison, L. R. 7, Q. B. D. 174.
Reversing same case, L. R. 5, Ex. D. 293 (and cases *supra.*)

The latter case is very instructive. The defendant there had been for some years the housekeeper of Mr. Alderson. She entered his service in 1845, when 16 years of age; remained until 1860; and her wages being then considerably in arrears, she determined to quit his employment. But he, being on old man, and anxious that she should continue, promised her if she would remain and continue to serve him during his life, and would forbear to press for her wages, he would, in view of the past and the future, leave her a life interest in the Manor House farm, which he expected to receive from his uncle, and in any other property of which he might be possessed, and would effectually secure such life interest to her; and it was mutually agreed between them to that effect. On

the faith of that promise she continued to serve him until his death in 1877. By his will he left the property in question to her, according to his agreement, for her life. But, through inadvertence, the will, though signed by Mr. Alderson, was not properly attested, and therefore failed; and the Court held that there could be no recovery. We respectfully ask, without further reference to the case, the careful attention of the Court to it, as decisive of the case here.

Third Point.

There was no actual change of possession, and no exclusive possession in the complainant to bring the case within the equitable principles which overbear the statute. All that is done by way of change of possession, as was said by Lord Hardwick, must be such as could have been done with no other view or design than to perform the agreement. While here, as was said in Alderson *vs.* Madison, *supra*, all that was done was as consistent with a previous expression of intention as with having previously entered into an agreement, and is equally consistent with never having done either one or the other. There was no act done or word said which indicated that he ever designed, during his life, to surrender the right to the possession of that property; and any possession which either Mr. or Mrs. Sutton had, was under him, and in subbordination to his right; and indicated no change in the social relations between them, which had existed since 1874. The possession therefore was not absolute; not exclusive; not notorious; in the sense that Mr. Kenyon had divested himself of the possession, and the complainant had assumed it.

But a word in conclusion. There is no equity in this case that should appeal to the conscience of the Court to strain the law in favor of this complainant. From 1874, to the time of his death, Mr. Kenyon had been the substantial support and mainstay of Mr. and Mrs. Sutton. He

had showered gifts upon them. He had treated her as a daughter. He had given her the home on Main street, which he inventories at $4,000. By his will, he had given her all his personal property, except his jewelry, remaining at Oconomowock; he had also provided for her an annuity, placing her in this respect upon equal footing with his sisters-in-law, and nearly upon the same footing with his own sisters, his own flesh and blood. Down to 1879, he had required but few offices; not so much as ordinarily required by men of his age. That Mrs. Sutton had rendered him acts of personal attention and kindness is undoubted; but they were no more and no greater, than any lady in any family voluntarily and gladly renders to another of the family superior in age. Mr. Kenyon, further intended, doubtless, to give her and her husband a good home during his life; and, perhaps, intended revoking the former provisions of his will, to give them this property upon his death, either absolutely, or the use of it during their life. From the general tenor of his will the latter provision would be far more likely. That intention of his —if any such existed—was never carried out, and proved abortive by his sudden death. Yet, unfortunate as the complainant may conceive herself to be, she has received from him in gifts of the Main street homestead and otherwise, and by the annuity provided by his will, largely in excess of the amount received by his sisters and sisters-in-law, who were connected with him by ties of blood and affinity.

It would seem by his will that his chief object was to dispose of his property among the various benevolent associations specified. To grant the complainant the relief she asks would in part defeat the intention of the testator.

It is respectfully submitted that the judgment of the Circuit Court should be reversed.

ERASTUS F. BROWN,
EDGAR K. BROWN,
Of Counsel for Appellants

United States Supreme
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JAMES H. McKE

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Appellants,

vs.

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Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF AND ARGUMENT OF APPELLEE.

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STATEMENT OF THE CASE.

May it please the Court:

The appellee, Sarah S. Sutton, filed her bill of complaint, as plaintiff, in the Circuit Court of Waukesha County, Wisconsin, against the appellants, to compel the specific performance of a parol contract made between the appellee and the defendant's testator, John S. Kenyon, in his lifetime, for the conveyance to appellee of certain premises situated in Waukesha County, Wisconsin.

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"complainant," and I have therefore retained and u
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The cause was removed to the Circuit Court of the United States, where a trial was had before the Hon. John M. Harlan, one of the Justices of this court, and the Hon. Charles E Dyer, Judge of the Circuit Court for the Eastern District of Wisconsin. A decree was rendered on the 30th day of May, 1885, in favor of the plaintiff below, and the cause removed here by appeal from that decree.

The complaint of the plaintiff stated in substance that about June, 1872, at Oconomowoc, Waukesha County, Wisconsin, John S. Kenyon entered into a parol agreement with the plaintiff, whereby he was to become a member of the family of the plaintiff and her husband, and to have the care and society of the plaintiff in his sickness and health, and to have all the comforts of a home as long as he desired, in consideration of which he promised that the plaintiff should be well provided for; that under said agreement he remained with plaintiff and her husband until August, 1880, when he entered into a further parol agreement with plaintiff, whereby he was to continue a member of the family of plaintiff and her husband, and to have the care and society of plaintiff in sickness and health, and have all the comforts of a home as long as he should live, and the plaintiff should in winters also keep house for him in the city of New York as long as he should desire to remain there, in consideration of which agreement, and such services and privileges already rendered and to be rendered, as aforesaid, he, the said John S. Kenyon, promised to purchase the real estate in dis-

pute, located in Oconomowoc, Waukesha county, Wisconsin, and build a new house upon the same, of sufficient dimensions to accommodate several persons besides the plaintiff and her husband, and to make other improvements on the premises, and, on the completion of said house and improvements, to convey the title in fee of the premises to the plaintiff.

That about September 23, 1880, the said John S. Kenyon purchased the said premises, put the plaintiff in possession thereof, in pursuance of said agreement (which possession plaintiff has ever since held), and commenced to make improvements thereon, building a barn and boathouse and repairing an old residence thereon. That about September 1, 1881, the said John S. Kenyon commenced the erection of a new house on the premises according to the said agreement, the estimated cost to be a little over $7,000, putting the entire management and supervision of the construction of said house and the making contracts for work and materials in the hands of the husband of the plaintiff, the said Kenyon furnishing money from time to time, as needed, for the work; that while the said house was incomplete, about $3,000 having been expended thereon, the said John S. Kenyon died, at the city of New York, about January 23, 1882; that at the time of his death he was carrying out and performing his part of said agreement in good faith, and that plaintiff had duly performed, on her part, all the conditions of the agreement.

That by the last will and testament of said John S. Kenyon, which was admitted to probate in the Surrogate Court in the county of New York, State of New York, February 10, 1882, the defendants, Erastus F. Brown and Francis A. Kenyon, were made executors of the will and trustees of the estate of said deceased. That, by said will, said John S. Kenyon, after making several small bequests of personal property and money, bequeathed to said executors the remainder of his estate, in trust, to be sold and distributed as directed in said will.

That the said John S. Kenyon died leaving an estate worth $150,000 over all his liabilities.

That the defendants qualified as trustees and executors.

That the defendants refused to carry out the said contract made between the plaintiff and the said John S. Kenyon, refused to complete the said building on said premises, and refused to convey the same to plaintiff.

The plaintiff demanded judgment that the defendants complete the house on said real estate, carrying out the plans and specifications adopted by John S. Kenyon, or that she recover a sum sufficient for such purpose, and that the title to the premises be conveyed to her. (Printed transcript of record, pp. 2–6.)

The answer of the defendants admits the death of John S. Kenyon; the execution and probate of his will; the devise of his estate in trust, as alleged;

the issue of letters testamentary to the defendants; the possession of estate by Joseph S. Kenyon at his death in excess of his liabilities; the purchase of the premises by John S. Kenyon as described in the complaint; the improving of said premises and the commencement of the construction of a dwelling-house thereon, in 1881, in process of construction at the time of his death; but denies all the other allegations of the complaint, and alleges that there was no note or memorandum of said agreement expressing the consideration subscribed by the said John S. Kenyon (10, 11).

Briefly stated,

The Plaintiff below claims

that there was a verbal contract entered into between her and Mr. Kenyon in 1879, but modified and concluded in 1880, to the effect that, in consideration that the plaintiff should act as his housekeeper in winters, when desired, in the city of New York, and that his home should be with the plaintiff during the summers, in Oconomowoc, receiving from the plaintiff the attentions which he was accustomed to receive and accept from her, in his health and sickness, he would purchase, improve and then deed to her the premises described in this action, and known as the "Oaks."

That, in pursuance of that agreement, she took care of Mr. Kenyon in sickness and health, kept his house for him as required, and made a home for him in her family until he died.

That, immediately after the arrangement made between them, Mr. Kenyon purchased the "Oaks," and her husband and herself were put in possession thereof by Mr. Kenyon, and had entire charge thereof.

That Mr. Kenyon, according to his agreement, furnished money with which to build a residence upon said premises, and Mr. Sutton proceeded to build, from the funds thus furnished, such a residence as she and Mr. Sutton, with the consent of Mr. Kenyon, desired to have. That the house was planned by herself and Mr. Sutton, and was being built just as she desired.

That it was the intention and the promise of Mr. Kenyon that the premises in dispute should be deeded to plaintiff for her future home, in return for her services and attentions which had for many years been given him, and which he expected her to continue giving him, and for which he chose and undertook to make return in that manner.

THE QUESTIONS OF FACT are:

1st. Was there an agreement between the plaintiff below and John S. Kenyon in substance as set forth in the complaint?

2d. Was there part performance of said agreement, and, if so, what acts in part performance thereof have been proven?

If it be shown there was such an agreement and part performance thereof, then

THE QUESTION OF LAW IS:

Are the acts proven as part performance sufficient to take the case out from the statute of frauds?

I.

A short History of the last fourteen years of the Life of Mr. John S. Kenyon.

In 1868 John S. Kenyon resided, with his wife, in Harlem, city of New York (22). In early life he had been by occupation a harness-maker and trunk-maker (289), and at one time was engaged in a silversmith's shop (293). He became subsequently interested in larger enterprises, was an officer of a bank in Harlem (30), and, at his death, possessed a fortune of nearly $200,000 (112, 256).

The plaintiff, Sarah S. Sutton, was the daughter of Charles Miller and wife, who was formerly a resident of the city of New York and thereafter of the city of Brooklyn (31, 41). The family of Mr. Kenyon and of the plaintiff's father were very intimate in their personal relations ever since the plaintiff was born (40). At the time of the trial of this case the plaintiff was about forty-four years old (120). The plaintiff, prior to 1868, was married to Charles T. Sutton, and has lived with him as his wife ever since their marriage. The plaintiff never had any children (78). Mr. Kenyon was also childless (23).

In 1868 the wife Mr. Kenyon was an invalid (23). The plaintiff, in that year, previous thereto and thereafter, during the life of Mrs. Kenyon, spent a large portion of her time with Mrs. Kenyon, comforting her, assisting and nursing her in her sickness (23). In 1868 Mrs. Kenyon was still able to be about and to travel (22). In the fall of that year Mr. and Mrs. Kenyon made a journey to Wisconsin, and visited in Oconomowoc, in that State, at the house of George F. Westover (31), whose wife is a sister to the plaintiff (30, 43). Sometime after the year 1868, the exact date not given, Mr. Kenyon and his wife removed to Tremont, near the city of New York, where Mrs. Kenyon died in February, 1872 (258). The plaintiff spent more or less time with Mrs. Kenyon while she resided at Tremont, and was with her when she died (259, 260). In the summer of 1872, soon after the death of Mrs. Kenyon, Mr. Kenyon, the plaintiff and plaintiff's husband together went to Oconomowoc, Wisconsin, and entered and lived in the family of George F. Westover (24); all of them, while there, paying a consideration therefor (23, 24, 32). The plaintiff and her husband remained there in the family of Mr. Westover until April, 1874 (32). Mr. Kenyon also remained there during the same time, excepting several weeks, more or less, in July and in December and January of each year (106–108).

In April, 1874, Mr. Westover removed from Oconomowoc to the city of Chicago (24), and on

the 28th day of that month Mr. Kenyon bought a small cottage on Main street, in the village of Oconomowoc (343), in which the plaintiff and her husband at once began housekeeping (24), Mr. Kenyon living with them as a member of the family (24). On the 1st day of July, 1874, Mr. Kenyon, in accordance with the request of his wife while living, deeded that cottage to the plaintiff, as a tribute to her from Mrs. Kenyon (41, 341).

For seven years the plaintiff, her husband and Mr. Kenyon continued living together in that cottage (24, 33), Mr. Kenyon paying a certain consideration there for board, or as his quota for the expense of housekeeping (34, 42). During these years Mr. Kenyon continued going to the city of New York, upon business of the bank with which he was connected, twice each year, so as to attend the meeting of the directors held the first of each July and each January (31). Sometimes he was in New York on those trips several weeks and sometimes two or three months (34).

While Mr. Kenyon was in New York, in February, 1879, he made a will, by which he bequeathed to a nephew a gold watch; to the "Colored Home for the Aged and Indigent," in New York, his wearing apparel; to his four sisters, Maria, Elizabeth, Abigail and Caroline, his jewelry and household furniture; to the plaintiff, Sarah S. Sutton, all personal property that might be in her house at Oconomowoc; and all the rest of his estate to trustees, who should distribute it as follows: To each of his four sisters the interest of $5,000 dur-

ing life; to two sisters-in-law and to the plaintiff each the interest of $6,000 during life; and all the rest of his estate, together with all the remainder after the expiration of the annuities, to be divided between fifteen different societies or associations, one being educational, two churches, two religious societies, one publishing society, three missions, and six charitable associations (94, 95, 96, 97).

In November, 1879, Mr. Kenyon, the plaintiff and the plaintiff's husband closed their cottage, in which they lived, in Oconomowoc, went to New York, and spent the winter there at Number 308 One Hundred and Twenty-fourth street, in a house belonging to Mr. Kenyon, and furnished by him (248), the family consisting of Mr. Kenyon, the plaintiff, the plaintiff's husband and one servant (171).

In the spring of 1880 the family (Mr. and Mrs. Sutton and Mr. Kenyon) returned to Oconomowoc (170), where they kept house during the entire summer and fall of that year, and also during the summer of 1881, in the cottage on Main street. During the winter of 1880 and the winter of 1881 the same family of three again kept house in Mr. Kenyon's house, at 308 One Hundred and Twenty-fourth street, city of New York (34, 129, 147, 157, 163).

In September, 1880, while in Oconomowoc, Mr. Kenyon bought of the Breck estate, for the consideration of $2,300, the premises in dispute in this action, known as the "Oaks," situated in Oconomowoc, Wisconsin (345).

In 1881 Mr. Kenyon began the erection of a large dwelling-house upon the "Oaks." Early in the fall of that year he went alone from Oconomowoc to the city of New York, to attend the wedding of a neice. He immediately returned to Oconomowoc (240). Later in the fall, or early in winter, Mr. Kenyon went with Mr. and Mrs. Sutton to New York for the last time. The three resided together as usual in his house, on One Hundred and Twenty-fourth street, until in January of that winter, when he was stricken with apoplexy and died (129).

Of the statements made in this brief history we apprehend there will be no dispute, and we will now ask the Court to consider the testimony bearing on the material questions of fact.

II.

WAS THERE A PAROL AGREEMENT BETWEEN THE PLAINTIFF AND MR. KENYON, SUCH AS THE PLAINTIFF CLAIMS?

Testimony of George F. Westover:

The plaintiff, her husband and Mr. Kenyon resided with Mr. Westover, in his family, at Oconomowoc, for nearly two years (24). After the Suttons and Mr. Kenyon began housekeeping in the cottage on Main street, and Mr. Westover had removed to Chicago, he frequently went to Ocono-

mowoc, and there visited with Mr. Kenyon and the Suttons (25, 34, 37). He visited the Kenyons at their residence in Harlem, in 1868 (22), and they visited him and his family, at his residence, in Oconomowoc, in the fall of the same year (31). He was employed by Mr. Kenyon, as an attorney (25). He went with him on a visit to relatives of Mr. Kenyon, to Ripon, Wisconsin (25). Mr. Kenyon talked with him a great deal about his affairs (25, 47). From these facts may be seen the opportunities that Mr. Westover had of knowing the relations between Mr. Kenyon and the Suttons, and the intention of the parties.

He testifies:

On board the train, on the way from Ripon to Watertown, he [Mr. Kenyon] began asking me what I thought of those people in Ripon. He said, among other things, he had no relatives really worthy to be considered relatives, with a very few exceptions. He said, "You have seen what they are in Ripon, and you have seen those in Chicago; the rest are nearly or very much like them. All they want of me is my money. Some day they will be terribly disappointed." He said no one had filled the place of a relative to him as had Mrs. Sutton; that she was the only one in the world that had been really to him like one of his family, and that he was under very great obligations to her, and how to discharge them or repay her, or attempt to repay her, was something he was considering. He felt doubtful of the best

course (25). He said, moreover, that he was going to make recompense to Mrs. Sutton for her services in some way. He did not know how it would be (26). After that, we conversed on the subject occasionally.

In June, 1881, I saw Mr. Kenyon at the house of Mrs. Sutton, in Oconomowoc. I had a long conversation with him. I had heard he had made purchase of the Breck place. I asked him about the place. He told me then that that was the final result of his determination as to Mrs. Sutton; that he had bought the place for her; that she wanted it, and he had made up his mind that it was the very best that could be done, and he had promised her that he would put a house on the place, such as she wanted, and the place should be hers. He said it was not perhaps as much as she was really entitled to, but he thought after all it would be better for her than if she should be provided for in some other way. He said he had made her home his home, and it was understood he was to continue thereafter making his home with Sortie, that is, Mrs. Sutton. We all, that is my family and Mr. Kenyon, called her Sortie. Sometimes he called her Sarah. I talked with him a long time. He said it was not sufficient for her really, but the idea was this, it was situated on the lake, would make a pleasant place for her, and, by having fine buildings on it, she would be able, if anything should happen to him, to take care of herself by keeping boarders. It would be a good place for summer boarders (26). I asked him what sort of a

house he was going to build upon it. He said, "That is not thoroughly settled. The house will be such as Mrs. Sutton wants. I have agreed that Sortie shall have the house just exactly as she wants it; just to suit her" (27). He said he was to continue to make his home with Mr. and Mrs. Sutton, and, in view of the past, and her services to him, and what had been done, and in view of the position which she was occupying as to him, and the services she had performed and was still to perform, he had promised her that place, and he had bought it for her, because it pleased her, and he had promised to build such a house thereon as she should want. He said that he thought Charlie and Sortie had pretty much settled on their plans for the house (27). He reminded me of what he had said to me before on the same subject, and said that, after much thought, he had concluded that was the best arrangement, and she had agreed to it, and it was arranged between them that he should continue to live with her in the future (37); * * * and that he had promised to buy that place for her, and fix it up, and deed it to her (37). * * * I understood from him, as he said, that the services of Mrs. Sutton which she had rendered him, and which he was under obligations to requite, together with those of the same kind which she had agreed to perform in the future, were the basis of his promise to convey her the premises in dispute, and were outside of anything which he had furnished in cash expense of living (42).

Testimony of Julia L. White:

Mrs. White is a sister of the plaintiff, and for several years visited the plaintiff in summers, at her home in Oconomowoc. In common with the family of the plaintiff's father, she has been intimately acquainted with Mr. Kenyon all her life. Speaking of an interview with Mr. Kenyon in 1881, she *testified:*

There was something said as to whose place it was to be. He [Mr. Kenyon] said it was to be Mrs. Sutton's. Mr. Kenyon said he wanted to give it to her, for she had taken care of him and was to continue to take care of him as long as he lived—had promised to, and that he had promised to give it to Mrs. Sutton (173, 174). * * He said that, on account of the services performed by Mrs. Sutton for him, for the care she had already given him, and for the care she had promised to give him, he desired to purchase the property for her (198); * * that he had bought the place; that it was for Mrs. Sutton—to make her home there for the care she had given him, and for the care she promised to take of him until his death (199).

I went with Mr. Kenyon to see the place in 1879, and I went with him to see another place, called the Starkweather place. He told me he was going to buy one of them for Mrs. Sutton (168). * * He said the house was to be their home (173).

Testimony of Joseph Scott:

Mr. Scott was treasurer of the church in Ocono-

mowoc which Mr. Kenyon attended (362). Mr. Kenyon collected subscriptions for the church, and frequently consulted the treasurer, Mr. Scott (368). Mr. Scott was formerly a contractor, and at first made an agreement to build a house for Mr. Kenyon (363). Afterward the agreement was canceled, because of Mr. Scott's other engagements (364).

Mr. Scott testified:

The reason he gave me for building the house was that Mrs. Sutton had taken care of him, and promised his wife to take care of him as long as he lived, and that he was building the house for them and also for himself, but that she was likely to occupy it longer than himself. He wanted it just as she wanted it (364).

Declarations of Mr. Kenyon.

Many other witnesses gave testimony of declarations by Mr. Kenyon corroborating that given by Mr. Westover, Mrs. White and Mr. Scott. We present the substance below:

Elizabeth Q. Westover, sister of the plaintiff, testifies:

When they stopped at our house in the fall of 1881, when they went east, Uncle John [Mr. Kenyon] said: "We have to get Sortie's place all ready so that she can take summer boarders and get it all fixed." * * I said: "Uncle John, you need a new hat." "Well," he said, "we are building the place for Sortie; after that is finished and Sortie is nicely fixed, I will get some new clothes" (44).

Judge David W. Small:

Resides next the "Oaks," and was a near neighbor of Mr. Kenyon and the Suttons, and knew them for several years.

He testified:

Along in September or October [1881] Mr. Kenyon was down in the barn, and I got over the fence, and walked down with him. We walked down by the lake. It was a warm, pleasant day. We sat down and began to talk about it. I said: "You have a mighty big house here; what use have you for such a house?" He said: "I am not building it for myself; I am building it for Mrs. Sutton." And I said to him: "That will be all right. You are not going to leave us?" "No," he said, "I shall stay here; the climate agrees with me here better, and so it does with Mr. and Mrs. Sutton." And then he said he did not want to be bothered with the building of it; he had left it all to Mr. and Mrs. Sutton; he had nothing to do with the building, except to furnish the money; they had modified the plans from the original, so the cost was less, but according to their own ideas; and the rooms and the adaptation of the rooms had been all arranged by Mrs. Sutton, and he intended she should have it as she wanted it. I then asked Mr. Kenyon in whom the title was, whether it was in Mrs. Sutton at that time. "No," he says; "when the property was bought I took the deed, but," he says, "I intend to have the property all fixed in Mrs. Sutton." I said: "Haven't you done anything

about it yet?" He said: "No." Said I: "You may have it in your mind to do something you want to do, but if you do not do it, if you should be taken away, it won't be done. Under our law, unless there is a writing made, or the parties put in possession under the agreement, it won't amount to anything." He said: "I can't make out anything here, for the reason my papers are in New York. I desire to make some alterations in my affairs, then I shall fix it up; but I shall put them in possession: I have put them in possession. Mrs. Sutton has had possession ever since I went to New York in the summer (46). I turned it over to them, and they are now in possession. Mr. Sutton has the keys to the little house and all the property, and I intend they shall be in possession, and they are in possession just as perfect as I can make it. If I had my papers here, I should have them altered now. I have my attorney down there. I don't want to do anything until I get down there." He said, "I propose to give it to them. Mrs. Sutton has been very kind to me in sickness and disease in my family; took care of my wife until she died. I have a good home myself with them. I propose now to repay them in this way." Then I think that ended it. Mr. Sutton was there all summer looking after the building. I had seen him frequently overseeing the workmen. Then, I think, about two weeks before he went away I met Mr. Kenyon again, before he went to New York. I know it was a short time previous to his departure to New York for the winter, and I said

to him, "Do you remember the talk we had?" "Yes," he says, "that is all right; they have put their furniture over there; they have possession of it, and they are now in possession of it. I am going down to New York. As soon as I get down there and get rested, I will fix it all right." He said another thing he wanted to get was the Norwegian Johnson's lot. He said he was negotiating for it; would like to get it before the papers were all made out. I was over there, I think, two weeks before they left. I found the little house had been finished and completed, and that the new house was up and roofed, and some back plastering done in it, and whether there were any windows in it or not I don't remember. They were boarded up, at least, and down below, I think, there were some temporary windows put in; I am not sure. The main house was all locked up; doors were all locked (47).

Louise C. Williams, who drew the contract between the builder and Mr. Sutton, and who placed the insurance upon the building while being erected, speaking concerning examining the building for insurance, *testified:*

Mr. Kenyon came out to the carriage and escorted me to the house through the building into the basement, and from there to the top of the house. I told him Mrs. Sutton had come to me and wished me to insure the building; therefore he took me through the whole building. Going to the main story he drew my attention to the fire-

place; spoke of the size and shape of the chimneys, and remarked that the building was larger than first intended; that Charlie drew the plans and got some of the doors so they conflicted, and it was remodeled and made two feet larger than he should have built it. He said, "It is as they want it; it is the children's; it don't make any difference to me how they fix it." He showed me "Sortie's room, my room, Millie White's room." Those are the expressions he used. By Sortie and Charlie he meant Mrs. Sutton and Mr. Sutton (63). * * * Always, at different times, when I have been to the place, in conversing of things they were doing, he represented to me it was for Mrs. Sutton—for the children (66).

William K. Washburne was employed to grade the grounds about the building. Speaking about being upon the grounds at work, and of Mr. Kenyon's sometimes being there also, he *testified:*

He was there every few days. He said he was fixing that up for Mr. and Mrs. Sutton; said he thought it would make a nice home. * * * He said that was their place. He told me he was fitting that place up for them. There was no talk about possession, because they were there (69).

Cooledge Eastman resided at about twenty rods from the Breck place, and was intimate with the Suttons and Mr. Kenyon. Mr. Eastman went on the place and showed Mr. Kenyon where the dividing line should be between the "Oaks" and the premises of Judge Small. He *testified:*

He [Mr. Kenyon] said he didn't care anything about the lines himself; he would not quarrel about the lines at all, but he wanted to have it settled while he lived, for he was fixing of it up for Mr. and Mrs. Sutton. * * * I asked Mr. Kenyon why he built such a high fence. It didn't look well. I said I would take it down to three and one half or four feet. He said, "That is my mind; if I was building it, I would not put it higher." The fence was about four feet high, but a little further ahead they had raised it up. It looked to me two feet higher. I laughed at him for raising it up so much higher. He said it was nothing to him, Mr. Sutton was building of it for himself; he had nothing to do with building of it (75). He spoke about fixing it up for Mr. and Mrs. Sutton, or the children; the way he called them was his children. He said he had lived with them, and made it his home, and expected to, as long as he lived, and he was fixing this place up for them (76).

Mrs. David W. Small testified:

He [Mr. Kenyon] came to the house, inquired if Mr. Small was making a survey. * * * He said: "You know, Mrs. Small, from conversations we have had, this property is not for my own especial interest, but I am interested in preparing it, or fixing it, for Mrs. Sutton. I want the title settled while I am living. I don't want any dispute hereafter." * * * We went on with an extended conversation about the intention of the building

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and plans. That was the point he made. It was his wish to have it settled, because he did not expect to keep the premises himself, but he wanted them for Mrs. Sutton. * * * A year ago last October Mrs. Colonel Shaler and I drove into the grounds, and he was working in front of the building. Mr. Kenyon was picking up obstructions and working around the garden. Mrs. Shaler remarked he was building a very handsome house. He said, yes, he was trying to make something comfortable and homelike. She said it was quite a large house, and asked him what family he had. He laughed, and said it was not exactly for himself; it was for Mr. and Mrs. Sutton. "I call them my children," he said. "I have consulted with Mrs. Sutton as I go on with my plans, and we always have to make some additions as we are building, and the building has grown larger than we first planned." * * * He said: "It is for her, and I don't consult my own wishes in the construction and arrangement of the building" (77). She asked him how long he had lived there. I don't remember his distinct answer, but he said he had made his home with Mrs. Sutton; she had taken care of him in sickness and health (77); he wanted to see her comfortably settled. * * * He said he thought perhaps, as they had no children, they might be lonely, and a neighbor would be company for them; so he concluded to fix up the little cottage and make it so it would not be an objection to the premises, and, if they saw proper to rent it or take boarders, they could util-

ize it in that way. He said: "It will all be for their use" (78, 79).

Harvey B. Anderson resided at Oconomowoc, and was well acquainted with Mr. Kenyon. He *testifies:*

I asked him if it was true that he had bought the Breck place. He said he had. I said to him I was very glad, because it looked like his becoming a permanent resident. I asked him if he felt anything like a granger. He said he could not say he did, because he did not buy the place for himself; he had bought it for Mrs. Sutton, who undoubtedly would be a permanent resident, although he should make it his home with them while he remained here, as he had for several years made their place his home. * * * He said the grounds were large enough to keep a cow and a horse and raise vegetables for the family, and he thought having the place would be a great benefit to Mr. Sutton, as he needed more outdoor exercise, and he would have that exercise in taking care of the place (81, 85, 86). Along in the summer time I had the conversation with Mr. Kenyon. They were building the new house. I remarked to Mr. Kenyon that he was building a much larger house than I supposed he was going to build. He said they were building it larger than they intended on the start, or than he had planned, but as he was building it entirely for Mrs. Sutton, at her suggestion they had enlarged it, and he wished to please her in the matter, and have it as she directed, and

building the house was no bother or trouble to him. Mr. Sutton had entire control of the building of the house, and he had authorized him to build it and finish it and make the improvements exactly as Mrs. Sutton wished (82, 87).

Celestia Edwards resided at Oconomowoc, and had been acquainted with the Suttons, Mr. Kenyon and the "Oaks" for several years. Testifying as to an interview with Mr. Kenyon, when she was looking at the house that was being builded on the "Oaks," she *said:*

I remarked when they got it all finished they would have a very beautiful place and home there. He said he liked it very well, but it did not make any difference to him; it was all theirs; it was the children's. They were fixing it up just to suit themselves. * * * This is the only time I can remember his saying distinctly that it belonged to them (90).

O. P. Andrus, a carpenter and joiner, resided at Oconomowoc, was shown the plans of the house by Mr. Kenyon, and consulted as to the construction. He *testified:*

As I got nearly ready to start, I asked him of the style of a bay window he wanted. He said he didn't care anything about the bay window, what it was. He said I could build it to suit Mrs. Sutton; he was building it for her, and he wanted her suited with the house (92).

Daniel McL. Miller, a physician residing at Oconomowoc, and brother of the plaintiff, was the

attending physician of Mr. Kenyon, and intimately acquainted with him for forty years (111).

He testified:

He [Mr. Kenyon] never said anything to me about any contract; he always spoke to me of the place [the "Oaks"] as Sortie's—Sortie's place. He engaged my services once to try and induce Johnson to sell his place. I employed Johnson a good deal, and he thought I might influence him. He said that he wanted to purchase that to go with Sortie's place. Johnson's place joined this place right at the entrance (110, 111).

Clarence I. Peck was acquainted with Mr. and Mrs. Sutton and Mr. Kenyon in Oconomowoc, in Chicago and in New York. He had a summer residence in Oconomowoc many years. Of a certain interview in Oconomowoc he *testified:*

Mrs. Sutton and Mr. Kenyon drove up in their wagon, or carryall, and asked me if I did not want to ride over to the new place. I went with them. Mrs. Sutton said, "That is my place," and Mr. Kenyon assented. After that, in the course of the ride, Mr. Kenyon remarked that he intended to finish up the place in good style for the children, as he called them (117). Afterward I was at the house where Mr. Kenyon lived, on Main street, with Mr. and Mrs. Sutton. I knew Mr. Kenyon had been in the habit of being over to the new place superintending the work, and I saw him standing in the yard at a time when he was generally over there. I said: "You are not over to your new place to-

day." He said, No, the sun seemed to affect his head; besides that, he said, "The place belongs to Charlie and Sortie anyhow, and I thought I would give the job of superintending it to Charlie" (118, 120).

Ferdinand W. Peck resided in Chicago, but had spent the summers for several years at Oconomowoc, and was intimately acquainted with Mr. Kenyon and with the "Oaks;" saw Mr. Kenyon almost daily every summer for ten years, in Oconomowoc. Mr. Kenyon was a constant visitor at his house (125). He *testified:*

I had gone over there [to the "Oaks"] in a sail-boat, with Mr. Kenyon and Mr. Sutton, and he said to me, after examining the premises, that he was building that place for these children, alluding to Mrs. Sutton and her husband; that he intended to give it to them as a home (122); that Mr. Sutton's health was better in Oconomowoc than in New York or elsewhere, and he was determined to get them fixed comfortably in that section or locality; * * * that his idea in having it constructed was to make it a home in the future for Mr. and Mrs. Sutton, calling them his children, and by the names of Sortie and Charlie. * * * On many occasions in the summer of 1881, Mr. Kenyon gave me to understand his purpose in building upon the premises was for the use and occupation of Mr. and Mrs. Sutton as a home. I remember being on the premises with Mr. Kenyon at least fifteen or twenty times that summer, and on nearly every occasion

something arose in our talk that gave me the understanding I have stated. He stated he had had a comfortable home with these people, and was very grateful to them for their care and attention during various times of illness, and was glad to be in a position to build such a place for them to use after his death (123).

Henry H. Shufeldt, a resident of Chicago, was a property-owner and spent his summers in Oconomowoc, and was intimate with Mr. Kenyon for seven or eight years. Mr. Shufeldt went to the Breck place one day while out horseback riding. He *says:*

While I was sitting on my horse Mr. Kenyon was sitting on a pile of lumber, and I asked him: "What are you doing here?" He says: "I am building a home for Charlie," meaning Mr. Sutton. I said: "What are you going to do with the little house?" He says: "We are going to improve it, and see if we can make this thing self-supporting" (126).

Vestiana Q. Freeman, of New York, an intimate friend of the parties, in visiting Mr. and Mrs. Sutton and Mr. Kenyon at One Hundred and Twenty-fourth street, heard them in conversation say that they were always to live together (158).

William E. White, husband of the witness Julia L. White, intimate with all the parties, testifying concerning an interview with Mr. and Mrs. Sutton and Mr. Kenyon, *said:*

This conversation occurred in February, 1881, at the house in One Hundred and Twenty-fourth street [New York]. The plans of the house being built on the Breck place were brought out and discussed. Finally Mr. Kenyon and I were left discussing the matter alone. He asked my opinion about the plans, this and that, and I gave my views as a disinterested party, and he finally said: "It is immaterial to me; I am building this place for Mrs. Sutton, and I wish to have it suit her" (202).

M. T. Draper, of Oconomowoc, acquainted with Mr. Kenyon, testified that previous to Mr. Kenyon leaving Oconomowoc, to go to New York, on his last trip, he went two or three times to the house of Mr. Draper, and in conversation said to Mr. Draper that he intended to make his home with Mrs. Sutton in Oconomowoc instead of in New York (210).

H. C. Koch, of Milwaukee, the architect who remodeled the plans drawn by Mr. Sutton, had several interviews with Mr. Kenyon in relation to the building. He *testified:*

When he [Mr. Kenyon] came in I talked with him about the rooms and who they were for. He told me he had no children and no wife; that he was a single man. He said there was a family living with him that had been living with him some time, and he took care of them and they took care of him, and that he was going to build that house for them; that he would be here in the summer, and in the winter he would go away. He gave their

names as Mr. and Mrs. Sutton. He had a sketch as to the arrangement. He told me Mr. Sutton made it himself, laid out how he wanted all the arrangements made (358).

Joseph Scott, whose testimony as to the relations between Mrs. Sutton and Mr. Kenyon we have already quoted, also *testified:*

I had conversation with him [Mr. Kenyon] in regard to the building he proposed to put up there. He showed me the plans. He told me the purpose of the building. He said it was for Mrs. Sutton for a dwelling house (362).

Not a word of the foregoing testimony is disputed

by any witness. No evidence whatever is offered by defendants to show that Mr. Kenyon did not make the agreement with Mrs. Sutton as shown, or that Mr. Kenyon had any purpose or plan in purchasing the "Oaks" different from that to which all of the foregoing witnesses testify, or that Mr. Kenyon ever made any declaration or assertion to any person inconsistent with the agreement to purchase the premises for her.

The sole item of evidence to which defendants refer, in opposition to all the foregoing testimony, is a paper found among the effects of Mr. Kenyon, on which he had noted a list of his assets, under date of January 1, 1882. Among those assets listed are the items "$4,000 house at Oconomowoc," and "$7,133 house at Oconomowoc" (256).

The item of $7,133 may represent the cost of the "Oaks," to that date. The item of $4,000 must represent the cottage on Main street, which he had deeded, in obedience to his wife's request, to Mrs. Sutton in 1874 (341). If the entry of the first item could tend to prove that he had never promised to convey to Mrs. Sutton the "Oaks," and had no intention of so doing, then the entry of the second item could likewise prove that he had never conveyed, and had no intention of conveying, to her the cottage on Main street.

It is because the legal title to the "Oaks" remained in Mr. Kenyon, when he made that list of assets, and even to the day of his death, that this action was necessary. Had the premises in 1881 been deeded to Mrs Sutton, and been stricken from the assets of Mr. Kenyon, there would have been no suit. Notwithstanding years of delicate health, and the dark warning that swift-winged apoplexy brought him, death found poor John Kenyon all unprepared, and seized him when he was still busy with incomplete schemes for further life.

III.

The plaintiff performed fully all her agreement.

There is nothing so utterly desolate as a homeless man. The devotion of the plaintiff and all

her tender care to Mr. Kenyon began when his wife was an invalid, and was baptized with his wife's blessings. For many years after he was a widower he found a congenial home in the family of Mrs. Sutton, without any hope or expectation on her part of reward for all the gentle attentions that tender woman can bestow on a prematurely old and feeble man. Recognizing her exceptional conduct, Mr. Kenyon longed to continue during his life the home he had found. He stated his desire, and they made each other the mutual promises we have shown. Let us see from the testimony how Mrs. Sutton performed her part.

Mr. Westover:

I know that the house was commenced after the plan which was shown to me by Mr. Kenyon (29). * * * I know that Mrs. Sutton continued to fill toward him the office of a member of his family, as a daughter, as I have already described, up until the time that they went to New York, the last time they went to New York. He never returned. I saw them then. I went with Mr. Kenyon to the railroad office to purchase the tickets. The plaintiff was with him at that time (28).

David W. Small:

Mr. Kenyon during the time he was here always lived with Mr. and Mrs. Sutton. He told me in the conversation he had always made his home with them since his wife died (48).

D. McL. Miller:

I know the fact that while he was here, she [Mrs. Sutton] took all care of him, rendering to him all such services as were necessary. If I gave any directions [as physician], I gave them to her and looked to her for the performance of those services, or the filling of the directions. I saw nobody else in fact. He never had any nurse only those two, Charlie and Sortie. * * * The plaintiff was his constant nurse and attendant (109.) * * * One or the other was always with him, either Sortie or Charlie, or somebody else. He never was permitted to go alone (110).

Dr. Samuel A. Hills:

John S. Kenyon resided at 124th street in this city [New York] in the winter months during the last two or three years of his life, * * * and he died there at his residence on 124th street. I attended him in his final sickness. I was called about ten or eleven in the evening by the servant girl at the house. I found Mr. Kenyon and Mrs. Sutton there. I do not recollect whether there were others (129). * * * I resided on the same street, four or five hundred feet distant. Charles T. Sutton and Sarah S. Sutton, his wife, resided in the house with Mr. Kenyon. I found Mr. Kenyon lying on the floor in the back parlor, with his head bolstered a little. He was semi-unconscious, physically almost in a state of collapse, with cold extremities and slow pulse. I stayed all night. Mrs. Sutton was attending him.

She had charge of him as nurse. I gave directions to her. She was there all the time, save one occasion she was out a little time, as I remember. I might say she was constantly with him, nights as well as days. I was not there at the time he died, but just previous to his death. Mrs. Sutton was with him then. He died of apoplexy (130). * * * Mrs. Sutton was his housekeeper that winter (132). * * * Mrs. Sutton sat by his bedside in his sickness almost constantly. She was on her knees on the floor, I believe, or sitting down by him when I went in. * * * I remained there three nights (135). * * * Mrs. Sutton was a member of his household there previous to his sickness. From what I have seen of those winters that they resided here in New York, I consider that Mrs. Sutton was looking after his wants as a daughter would look after the wants of a father, whether they were of the character of a sick or well; it seemed to be her purpose to do so (138).

Caroline M. Hills:

I am a sister of Mr. Sutton. Have been acquainted with Mr. Kenyon thirty-five years. * * It is several years since he began his summer residence in Oconomowoc. The first summers he lived in Mr. Westover's house some parts of the time. I was at Oconomowoc, and have seen Mr. Kenyon there. I saw him there at Mrs. Sutton's. She was then housekeeping on Main street in a cottage. * * * Mr. Kenyon spent the winter

of his death and the two previous winters in Harlem, at 308 E. 124th street, with Mr. and Mrs. Sutton. Mrs. Sutton was housekeeper. I resided on the next block; and was a visitor at their house frequently, several times a week (140). * * * It was in the evening that he was stricken with his final sickness. I went to the house next morning, and was there all day. Mrs. Sutton was his nurse. She sat by him and attended to the instructions of the physicians. I heard them give her instructions, Dr. Hills and Dr. Freeman (142). * * * When I was there, Mrs. Sutton sat by his bed-side the greater part of the time. I saw her wetting his mouth and his head (146).

Dr. N. M. Freeman:

I have practiced as a physician thirty years. I knew Mr. Kenyon, but not long previous to his last sickness. He was taken sick on Thursday, and I was called in on Friday afternoon, the next day, to consult with Dr. Hills (148). Mr. Kenyon took dinner with me at my house, 222 E. 87th street, on the day he was taken sick. Mrs. Sutton was with Mr. Kenyon at my house that evening. He left my house about half-past nine, either with Mrs. Sutton or Mr. and Mrs. Sutton. The next afternoon I saw him at his house. Dr. Hills was there, Mrs. Sutton was there, some of Mr. Kenyon's sisters were there. He was laboring under an attack of apoplexy, unconscious (149).

Vestiana Q. Freeman:

I was at their house in 124th street a number of

times during Mr. Kenyon's last illness. I first went there Friday, the day after he was taken sick. Mrs. Sutton was acting as Mr. Kenyon's nurse (160).

Adelia M. Valentine:

I boarded with Mrs. Sutton in Oconomowoc in the summer of 1878. * * * Mr. Kenyon was there. He was sick once while I was there, and was not feeling well most of the time. He complained most of his head. * * * Mrs. Sutton always attended him (163).

Julia L. White:

From 1875 to 1879, I made my home in the summers at Oconomowoc, with Mrs. Sutton. Always met Mr. Kenyon there. * * * He complained a great deal of pain in the head; three-fourths of the time I think. * * * In severe attacks he had compresses put on his head. Mrs. Sutton attended him; whatever could be done she did (167). * * * Wherever he went, she went. He was subject to bad attacks. He constantly asked Mrs. Sutton for care. He called on no one else for nursing (168). * * * I was at Mr. Kenyon's house during his last sickness. Mrs. Sutton was there. I met Dr. Hills there. I heard him give instructions concerning Mr. Kenyon to Mrs. Sutton (171). Mrs. Sutton was there the last day I was there, the day of Mr. Kenyon's death. I left between eleven and twelve, and he died about one. When I left, he was low, uncon-

scious. Previous to his final sickness, Mrs. Sutton attended to his wants (172).

William E. White:

I knew Mr. Kenyon twenty-two or twenty-three years. I saw him at Oconomowoc in 1875 (200). * * * I staid at the house of Mrs. Sutton. He was there. I recollect Mrs. Sutton, Mr. Sutton and Mr. Kenyon resided together in New York in the winters of 1879–80, 1880–81 and 1881–82, on 124th street, and I visited them there. * * * Occasionally, until they went West, they were in the habit of coming to our house about every other week, and I went there once in two weeks generally. * * * In those visits he told me his head was troubling him a good deal, and he found out he was not what he once was. He complained of his head. I know that he looked to Mrs. Sutton for nursing. He told me he looked to Mrs. Sutton for his care (201, 202).

Joseph W. Scott:

I observed he never went anywhere, to meeting scarcely (365), without Mrs. Sutton was with him. I remember frequently inquiring of him why he did not attend prayer-meeting more. He said his health was so poor Mrs. Sutton didn't like to have him out nights; for that reason he did not attend prayer-meeting any more. Mrs. Sutton didn't like to have him out nights in the night air, and he didn't come. I have seen Mrs. Sutton and Mr. Kenyon on the streets together, sitting out talking

together, and riding together. I have heard her at different times tell him that he must not do so and so—that he must go home: he always went (366). * * * He said he had a house in New York, and how it was warmed, and that Mrs. Sutton was his housekeeper, and had taken care of his wife, and that it was the wish of his wife that Mrs. Sutton would be provided for as long as she lived (367). * * * When he came to church he always came with Mrs. Sutton. Mr. Sutton came pretty much all the time, not all the time (369).

IV.

Mrs. Sutton was, in pursuance of the promise of Mr. Kenyon to convey to her the "Oaks," by him put into possession of the premises.

As much as Mr. Kenyon could, he delivered possession to Mrs. Sutton of the premises he agreed to convey to her. He could not have been personally barred from them, or been refused a home upon them, in order to make more perfect the possession by Mrs. Sutton, for that would have been in violation of the agreement between the parties. The defendants are dissatisfied with the character of the possession by Mrs. Sutton, because Mr. Kenyon was still allowed on the premises.

Immediately after the purchase of the "Oaks," the husband of the plaintiff erected a boathouse

(65) on the premises, and moved his boats (38, 111), of which he had several, into it (379), built or repaired a barn, and remodeled and repaired a small dwelling-house thereon (29). Mr. Kenyon furnished money to purchase the material used in this building and repairs, and to pay for whatever labor was employed (38, 46, 377). In the fall and winter of 1880 and 1881, the plaintiff's husband drew plans for the dwelling-house to be erected (27, 39). The plans were submitted by Mr. Kenyon to an architect, in the summer of 1881, by whom they were revised and perfected (318, 319). September, 1881, the plaintiff's husband entered into a written agreement with a contractor to build the desired dwelling-house (93). The construction was begun immediately thereafter, and continued until the last of November, 1881, when the premises were closed, and plaintiff, her husband and Mr. Kenyon went to spend the winter in the city of New York, as already stated (116).

Let us examine the collated testimony on the question of possession.

Mr. Westover:

I know that Mr. Sutton, long before the house was built, went there and built a boathouse. I know that Mr. Sutton moved the old house that was on the place at the time it was purchased, moved it from the old foundation upon a new foundation, and that he repaired the house and fixed it up. When I was there in the fall of 1881, he had moved his boats and some furniture to the

place, and he kept his horse and wagon there, and various things he had. The boat house was built long before that. When I went there in 1881, it was up and the things were in it. Mr. Sutton was then there engaged fixing the place, changing it, making improvements and giving directions to the men. There was no one in possession but Mrs. Sutton and Mr. Sutton. Mr. Sutton had sole charge and possession of the place. I was there at the place with both of them. That was before they went to New York, the last time I was with them at the premises. It was in the fall of 1881 (29). I never saw Mr. Kenyon there after that. The boathouse was constructed and Mr. Sutton had his things there on the place, perhaps many months or a year before they went to New York. Some furniture was there, and their horse was kept there. * * * When they went to New York, I met Mr. Kenyon and Mr. and Mrs. Sutton at the depot in Chicago, when they arrived from Oconomowoc. We all came from the depot together, and Mrs. Sutton or Mr. Kenyon, one or the other, said to me then that when they returned in the spring they were going to live in the little house on the Breck place (30). * * * The little house had been moved from its old site and put on a new foundation (35). It was locked. Mr. Sutton had the keys. I was there once or twice, and he had them when I was there. He appeared to have them in his pocket (36). * * * I observed Mr. Sutton had charge of the place. He was supervising it, according to his or Mrs. Sutton's

desires. He was apparently employing and discharging help, making contracts, grading the grounds, fixing the house, and otherwise improving the premises, so far as I could see or hear, according to his own or his wife's wishes only. I know that he placed many of their things upon the premises; that he had his boats there, kept them there; that they had Mrs. Sutton's horse and buggy there, and Mr. Sutton had various farming tools there, which I saw. They also had some furniture there, in the little old house. They had commenced in 1881 to move some of their things to the house that had been moved. I saw them then in the old house on the Breck place. Mr. Sutton built the boathouse, Mr. Kenyon paid the bills (38). Mr. Sutton planned it according to his own choice; located, designed it, and directed its construction. I saw the boathouse, and both Mr. Kenyon and Mr. Sutton told me about it. Mr. Sutton built most of it with his own hands. He employed all his time on that place. I don't know that he hired any work on the boathouse. * * * I don't know the names of the workmen Mr. Sutton employed. He had one by the name of Washburne working for him, overseer of the grading. I saw Mr. Sutton consulting him or giving him directions as an employer to one employed. * * Previous to the boats being moved there, they were kept at the cottage where Mrs. Sutton lived, and from there they were moved upon the new place (39).

Elizabeth Q. Westover:

At the time I went to look round the place, "The Oaks," among other things I saw about the house, I saw some dining-room furniture in the house, and I didn't know before that anybody had moved anything over there yet. The furniture belonged to Mrs. Sutton. I had seen it in the old house where they lived. That was the last of August or the first of September, 1881 (44).

David W. Small:

We re-quote a few sentences from his testimony already inserted herein (ante page 18). In his testimony of an interview between him and Mr. Kenyon at Oconomowoc he said:

Said I [to Mr. Kenyon], "You may have it in your mind to do something you want to do, but if you do not do it, and if you should be taken away, it won't be done Under our law, unless there is a writing made or the parties put in possession under the agreement, it won't amount to anything." He said, "I can't make out anything here for the reason my papers are in New York. I desire to make some alterations in my affairs; then I shall fix it up; but I shall put them in possession. I have put them in possession. Mrs. Sutton has had possession ever since I went to New York in the summer. I turned it over to them then, and they are now in possession. Mr. Sutton has the keys to the little house, and all the property, and I intend they shall be in possession just as perfect as I can make it." * * * About two weeks be-

fore he went away to New York I met Mr. Kenyon again. I said to him, "Do you remember the talk we had?" "Yes," he says, "that is all right; they have put their furniture over there; they have possession of it. They are now in possession of it" (46, 47, 48). * * * "They are now in full possession of it just as much as though they had the title (49). * * * He said that he had requested Mrs. Sutton to put the furniture in there; that the keys were in the possession of Mr. and Mrs. Sutton, and everything would be locked up, and possession would be theirs (51). * * * I don't think I was ever over there but what Mr. Sutton was there. I was there a dozen or fifteen times during the summer (52). * * * When they came back in the spring they lived there (53).

Jacob Weltner:

The boathouse was built before I built the new house. Charles Sutton hired me. I made the contract with him. * * * I went over there one day to stake out the grounds. I was late, and when I got there Mr. Sutton was gone. I saw Mr. Kenyon on the road. He was grading the road. I said: "I am sorry I was late, I had so much to do. I wanted to do that work." Says he: "I have nothing to say. You must see Mr. Sutton" (54, 55). I made a contract in writing with Mr. Sutton. We went to Mrs. Williams, and she drew the contract. In pursuance of that contract I constructed the house (55). Mr. Sutton hired me, paid me and the men. I had some of my men, and

Mr. Sutton had some. Mr. Sutton had the general charge. Mr. Kenyon was there nearly every day, but he was in the garden gathering up corn and tomatoes. He had nothing to say. I don't believe he asked a dozen questions while we were building the house. Mr. Sutton did it all. He superintended the boys generally. When he wanted anything, he told me; and when I wanted anything, I asked him, and he ordered it just as he wanted it. He had the keys of the barn where we kept the tools. Down below I kept my horse, and Mr. Sutton had the keys of the barn. There were no keys to the house; just closed the windows and doors with boards to keep the storms out. Mr. Sutton had the key of the other building. It was not occupied; it was locked. At that time Mr. Kenyon was living with Mr. Sutton in the house on Main street. Mr. Sutton paid the money to the workmen and to me (56). He paid all bills, everything, and bought the brick we used there, and paid for them, and the stone, lime and sand, and all that was bought there. Mr. Sutton always paid the bills. I never saw Mr. Kenyon pay a dollar. I finished my contract, and Mr. Sutton accepted it. He felt pleased, and said: "This is all we can do now. We will get it lathed this winter; next spring we will finish it" (57). * * * We generally went into the old building in the basement. They had some furniture upstairs. We went into the basement; we had a stove there, and warmed our coffee (58). After we left, Mr. Sutton had a man in charge. He did not stay there

nights. * * * No one was left there. We were paid in currency, Saturdays, right at the building, by Mr. Sutton, always (59).

Louise C. Williams:

Mr. Weltner had charge of the carpenter work. The general manager, I suppose, was Mr. Sutton (61). He was the manager. I was on the premises a good many times, and saw Mr. Sutton directing, and so on (62). * * * I insured the property in November, 1881, at the request of Mrs. Sutton (62). * * * She paid me for it (64). * * * I often went there and saw the improvements they were making. Mr. Sutton had the keys to the house and the boathouse when I passed through and looked them over. There were no doors to the new house (65).

W. K. Washburne:

On the 4th of October, 1880, I went there [to the "Oaks"], hired the men myself, and went to work grading and digging out for the boathouse, under direction of Mr. Sutton. After I got the boathouse foundation graded and fixed to his idea, I went at the foundation where the barn is, and fixed that ready for the barn, and graded off the lot next the lake, and fitted up the bank and driveway, and excavated a place for the old house to stand. I was there a month. Mr. Sutton engaged me to do that work (68). * * * There was no talk about possession, because they [Mr. and Mrs. Sutton] were there (69). * * * I considered Mr. Sutton had possession. He was there

every day and directed, and was working every day, and worked on the boathouse, and had the keys of the house and the boathouse. He was the last man away every night (70). * * * When I went to get the keys, sometimes I went to the house for them and got them from Mr. Sutton (71).

Jacob C. Van Horn:

I built most of the chimneys. Mr. Sutton was building. Mr. Weltner was the head boss carpenter. Mr. Sutton hired me and paid me (72).

Harvey B. Anderson wanted to hire the cottage on Main street. He went there. He saw Mr. Kenyon standing in front of the house. He *says:*

I asked him where Mr. and Mrs. Sutton were, and he said they were in the house. I told him he could probably answer the question. I asked him if they were going to take possession of the place immediately, or the next spring, and gave my reason; if so, and they were going to rent that house, I wanted the first chance. He said they were anxious, and Mrs Sutton was anxious, to take possession of the place as soon as possible, and that they would undoubtedly move there in the spring (82). * * * Mr. and Mrs. Sutton went there to live when they came back in the spring of 1882.

D. McL. Miller:

I know this much; the day after the place was bought, I guess really before the papers were made out, they moved a lot of their things over there; moved their boats, and went to work building a

boathouse; went right to work on the place. I know they had furniture there. I know they had the keys; I mean the plaintiff and her husband. I know they had full directions. I know they laid out all the work, and saw it was done, and all references were made to Sortie. Charlie built the boathouse himself, I guess. He did the labor on it, to a great extent (111). * * * One day I happened to be over and Van Horn wanted to get in there, and he came over to Mr. Sutton for the keys. Mr. Sutton pulled they keys out of his pocket, I think. He may have gone to the house to get them, but he gave the keys to Van Horn (116).

Ferdinand W. Peck:

I should say that Mr. and Mrs. Sutton had possession of the property as soon as any possession was taken by anybody, and have had the management and care from the time of its inception up to the present time (123). * * * I do not remember whether anyone was left on that place, until after Mr. Kenyon's death. I know that Mr. and Mrs. Sutton were there daily; whether the premises were so far completed before his death that they remained over night, I cannot say (124).

Henry H. Shufeldt:

Mr. Sutton had the management of it; certainly, as far as the management was concerned, was in possession. I very frequently went over there and found them in possession, sitting under the trees. I mean Mr. and Mrs. Sutton and Mr. Kenyon. Mr.

Sutton had the boats and other things fixed over there on the place. I helped him get one in the boathouse myself. I think this was in the spring, when the boathouse was completed. It was some time earlier than they started the house. The boathouse was finished, and when he put the boats in he took two old barges—I think they were left on the other side—took them in there, and put some things in the barn (127).

Charles T. Sutton:

I acted in relation to that matter as the agent of Mrs. Sutton. It was proposed to me that I should take entire charge of the construction and improvements that were going on at the place. I acceded to the proposition and did so, commencing work there as soon as the place was purchased—even before the papers were passed. I went to the place by direction of Mrs. Sutton, and commenced tearing down the old barn preparatory to putting up a new one. A short time after that I commenced the construction of a boathouse on the place. That work was conducted by myself, with the assistance of two men that I employed. I personally worked on both of those buildings. I continued in charge of the construction from that time until the house was closed, the last winter, under the authority of Mrs. Sutton. * * * November 22, 1881, on the morning of that day, the day we left Oconomowoc to go to New York, I gave the key to Mr. Kenyon to take to the "Oaks," and give it to Mr. Hoge. I was very busy closing the house, preparatory to

leaving for New York. I had instructed Mr. Hoge to watch the place during our absence. He had watched it the winter previous (374, 375). * * Part of the household furniture, some agricultural and mechanical tools were moved by me and Mrs. Sutton from the house on Main street to the "Oaks," in the fall previous to our leaving for New York the last time. In the spring of 1882 we took up our residence at the "Oaks" (377, 378). * * The money was furnished by Mr. Kenyon to pay the improvements. The work which I individually did was not paid for in any manner. I removed part of our furniture in the fall to the "Oaks," and the remainder of it in the spring, after our return from New York. In the fall I moved stoves, chairs and table, and I think a carpet, and agricultural and mechanical tools of my own, that I had used at the house on Main street. I had also moved my boats, several boats, that were placed in the boathouse in the fall at the same time—about the same time (379).

Vainly the Defendants Controvert the Claim of Possession by Plaintiff.

Not having disputed the agreement between Mr. Kenyon and Mrs. Sutton, as testified to by the plaintiff's witnesses, by a word of testimony; not having contradicted a syllable of all the testimony as to Mr. Kenyon's declarations that the "Oaks" were for Mrs. Sutton; the defendants plead the statute of frauds, and attempt to show there was

no possession of the premises in Mrs. Sutton. The foregoing evidence shows positively that Mr. Kenyon did every possible act to put plaintiff in possession, and that plaintiff received and held the property.

To contradict this direct testimony, defendants have examined fifteen witnesses—one was watchman of the premises, and received the keys of the house from Mr. Kenyon, as the family were starting for New York, in the winter of 1801 [Mr. Sutton handed the key to Mr. Kenyon, and requested him to take it to the watchman (375)]; one run the line between the Breck place and Judge Small's lands, and says Kenyon was there and claimed to be owner; five saw Mr. Kenyon walking around the place, doing nothing; one saw him at Sutton's house; one says Mr. Kenyon lived with the Suttons; one says both Mr. Kenyon and Mr. Sutton ordered work of him; one did the plumbing on Mr. Sutton's order, at Mr. Kenyon's expense; one sold lumber on Mr. Sutton's order, at Mr. Kenyon's expense; one, at Mr. Kenyon's request, remodeled the plans of the house, which Mr. Sutton had drawn; one issued a policy of insurance on the house to Mr. Kenyon; one sold him brick; one sold him lime; one sold him a wagon; one sold him a horse; one hauled brick for him; two worked on the place for Mr. Sutton; three were paid by Mr. Sutton; one collected taxes of Mr. Sutton; four said Mr. Sutton was manager and had whole charge of the place; and one said Mr. Sutton worked on the place all the time.

That is all that defendants present to show that the Suttons were not in possession. We here produce the testimony, feeling we should apologize for the defendants, and admit that the utter want of any possible application of the evidence to the issues in this case is not due to the absence of zeal or effort on the part of the disappointed defendants.

Evidence on Possession, by Defendants' Witnesses.

E. Barnard:

I sold Mr. Kenyon a black mare; it was bought for the purpose of being used by a lady—by Mrs. Sutton (301, 302).

W. H. Young:

I sold Mr. Kenyon a wagon in the spring of 1881, for $40. Mr. Sutton took it away. I presented my bill for the wagon to the estate, because I wanted my pay, and I received it (303, 304).

Otis Fay:

I hauled two loads of brick for Mr. Kenyon to fix the basement in the old house. Mr. Kenyon paid me. I hauled sand, brick and stone for the new building. Mr. Sutton hired me and paid me. Mr. Sutton was manager at the place. I worked for Mr. Sutton on the building (304–308).

William Besser:

I sold lime for the new house. Mr. Sutton spoke to me for it. I made out the bill to Mr. Kenyon—

don't know at whose suggestion, unless at Mr. Sutton's. I presented the bill to Mr. Kenyon. He sent me to Mr. Sutton, and Mr. Sutton paid it. Mr. Sutton always gave me the orders. I saw Mr. Kenyon looking around the Breck place, doing nothing. Mr. Sutton was the managing man when I was on the place (308–310).

E. S. Chadwick:

I sold Mr. Kenyon a carload of brick for the house. He bought it (310, 311).

J. C. Van Horn:

I presented my bill for lathing to the estate of Mr. Kenyon. I saw Mr. Kenyon around the Breck place doing nothing but walking around alone and looking at things. Mr. Sutton had whole charge of the work (311–313).

Charles Van Alstine:

As agent, I issued a policy of insurance to Mr. Kenyon, November 1, 1880, on the building on the Breck place. Sometimes I saw Mr. Kenyon walking about with Mrs. Sutton, sometimes alone (314–317).

H. C. Koch:

Resided in Milwaukee; am an architect; fixed plans for Mr. Kenyon; he came with Mr. or Mrs. Sutton to my office in Milwaukee at first; saw Mr. Kenyon several times afterwards; once or twice with Mrs. Sutton. Mr. Kenyon said the sketches he brought were made by Mr. Sutton. I worked from those sketches (317–319).

Charles Wichman:

Am a carpenter; made my bill for work on the house to the estate of Mr. Kenyon, because Sutton told me to; worked on the new house and on the boathouse. Sutton hired me and always paid me. Mr. Kenyon was there doing nothing. He came in a boat some times; sometimes Mrs. Sutton with him. Mr. Sutton bossed the business, and worked there all the time (319–322).

F. Heubner:

Collected taxes in 1881 on the Breck place; think Mr. Sutton paid me, but receipt was in Mr. Kenyon's name, because property was assessed in his name; knew Mr. Kenyon, and frequently saw him on the streets going to post-office; saw him on the Breck place walking and looking about; generally saw him with Mrs. Sutton, and frequently with Mr. Sutton; not often alone (322–324).

George Vilas:

I sold the lumber for the new house. Mr. Sutton made the arrangements. Mr. Kenyon paid a part; the balance I made out against his estate. I saw Mr. Kenyon frequently, walking and riding; often alone. My impression is that Mrs. Sutton or Mr. Sutton was usually with him; don't think I saw him ride alone. He lived with Mr. and Mrs. Sutton. They were generally together; was not told to charge the bill to Mr. Kenyon (324–328).

Hugo Lorleberg:

Am a hardware dealer; did plumbing in the

house built on the "Oaks". Sutton ordered the work, and paid me $200. Mr. Kenyon sent me a check for about $200. I made claim against the estate of Mr. Kenyon for balance of $10. Mrs. Williams paid me. I saw Mr. Kenyon at Mrs. Sutton's house often; saw him sailing with Mr. Sutton; saw him many times with Mr. Sutton—then again alone. He was generally accompanied by Mr. and Mrs. Sutton (328–330).

A. Simons:

Am a painter; worked on the Breck place; made out my bills to Mr. Kenyon; don't know why. Both Mr. Kenyon and Mr. Sutton ordered work done, and after Mr. Kenyon's death I made out my bill against the estate, and sent it in, according to Mr. Sutton's directions. I saw Mr. Kenyon on the Breck place, doing nothing. Sometimes he went in a boat alone; sometimes with Mr. Sutton. Did not see him at any time in buggy alone (331–333).

Albert Hoge:

Am a laborer; November, 1881, on the day before he left, Mr. Kenyon gave me the keys to the Breck place. He told me to take charge till he came back. I kept them till March, then gave them to Mr. Sutton. Mr. Kenyon told me he would make it all right as to pay. Sutton told me to make out my bill, and give it to Mrs. Williams. I did so, and got my money. Mr. Sutton told me at the same time to keep a sharp watch on the

place. Mr. Kenyon and Mr. Sutton were together (333-337).

R. C. Hathaway, the surveyor who run the line between the "Oaks" and Judge Small's place:

I run the line between the Breck place and Judge Small's. Mr. Kenyon was there. He claimed to be owner of the place. Mr. Sutton was also present when the line was run, and assisted. Mr. Kenyon came for me. Mr. Sutton took me home in a sail-boat (354–355).

V.

The Health of Mr. John S. Kenyon.

Doubtless the agreement between Mr. Kenyon and Mrs. Sutton does not depend for its validity upon the state of Mr. Kenyon's health, unless indeed with mind enfeebled by disease, he was made the willing and helpless victim of her persuasions. Haply, for the cause of justice, the defendants have shown by several witnesses, what the plaintiff readily admits and joins in asserting, that Mr. Kenyon remained to the day of his last sickness of sound mind, prudent, sagacious, and clear-headed (294).

The plaintiff, in showing the character and amount of personal services bestowed by her upon Mr. Kenyon, incidentally, and perhaps unavoidably, has made manifest the poor condition of Mr. Kenyon's physical health, during the last several years of his life. Here eleven witnesses for the

defendants, consisting of disappointed relatives and members of some of the fifteen obscure associations which are legatees under the will of Mr. Kenyon, found a subject upon which they thought they were informed. They have testified to the good health of Mr. Kenyon. *Mr. Samuel B. Kenyon* says the deceased was "always able to feed himself." *Mr. Yost* says he saw him the day before his death, and the apparent condition of his health was good *Mr. Selchow*, who personally suffered much with neuralgia and dyspepsia, thought Mr. Kenyon enjoyed the same health. *Maria S. Kenyon* says he was well all the time, but subject, like all the family, to occasional head-aches. *Dr. Brockway* supposed him to enjoy good health, but never was consulted by him, and had an how-do-you-do acquaintance. *Margaret Kenyon* says he appeared to be in good health. *Elizabeth B. Kenyon* says he sometimes had head-aches and neuralgia, but she never knew him to lose a meal. *Caroline Brown* says his health was good, excepting occasional head-aches. *Samuel Virgin* saw him at Maria Kenyon's, and did not notice any appearance but of health. *Mr. McGown* met him in his office and in the street, and thought his health was good. *Mr. Van Voorhis* met him at the bank and walked with him on the street, and thought his health perfectly good.

The defendants also examined some disinterested witnesses in Oconomowoc. *Warham Parks* says Mr. Kenyon was sagacious and clear-headed; had no association with him; didn't like him; didn't

know when he was sick. *Mr. Lardner* knew he was sick once, and he might have been so many times without witness' knowledge; thought he appeared well for a man of his age. *Mr. Hathaway* thought he was all right at a time when he met him. *Mr. Heubner* says Mr. Kenyon told him in 1880 his health was poor. *Mr. Vilas* says his health was not good. *Mr. Van Alstine* knew that Mr. Kenyon was confined to his bed in 1878 or 1879; that he complained of his head a good deal, and had spells when he was not well. *Mr. Lorleberg* thought him in failing health; and *Mr. Simons* says he seemed to be kind of sickly and growing old.

The position of the defendants seems to be this: A feeble man growing old has no business to choose his nurse, if he can possibly get along in some other way; even if he desire to make a choice and fix the reward, his act should be disregarded, if it appear he could feed himself and walk alone.

Having stated what the defendants' witnesses, in substance, testified, we produce now their testimony.

Samuel B. Kenyon, of New York, cousin of the deceased:

I remember the circumstances of his death. I was present. I was there more or less from the time he was taken sick, and saw him on the day he was stricken down. It was about the middle of the day. His condition of health at that time was perfectly good, as far as I could see (211, 212).

* * * I occasionally met him with Mrs. Sutton. Mr. and Mrs. Sutton never came to my house with him, but I have met her with him. I have met her in stores in town with him; have met her in Stewart's with him; have met her in the streets with him; but she never came to my house with him, or to my office (213). * * * I never saw that he required any particular attention, unless people wanted or were very anxious to bestow their attentions. As for his requiring it, I did not see that it was necessary. * * * He was always able to feed himself, to carve for himself, and everything of that kind, and he never wanted the attention of Mrs. Sutton or anybody else, without the attention was bestowed on him by courtesy, or something of that kind. He was always able to feed himself, or attend to himself, up to the day he was stricken down. * * * I think Dr. Brockway generally attended him, if he wanted a doctor; but I never knew that he was really sick enough to require a doctor, until his last sickness, though he might, possibly. He was generally very healthy and robust, a very good feeder and good eater, and he liked what was good (214).

Charles A. Yost:

The day before his death I met him at evening prayer-meeting. He was unattended. * * * It was a rainy night, and he had an umbrella. * * * I lived around the corner from the church; he shielded me from the rain with his umbrella. * * * The apparent condition of his health was

as good as it has been at any time I have known him (228). * * * I have met Mrs. Sutton in church. Mr. Kenyon introduced me to her several years ago, and when she called, of course, as an officer of the church, I would take her by the hand and give her a cordial greeting. * * * I don't want to be understood that she was there on very rare occasions. I won't say that, but she was not a regular attendant (232).

E. G. Selchow, of New York, met him at meetings of the Board of Trustees of the Harlem Presbyterian Church:

I met Mr. Kenyon on the street frequently, and conversed with him. Generally he was unattended. I considered him a very healthy man (234). * * * I should say Mr. Kenyon was an ordinarily healthy man; that is to say, he apparently enjoyed the same health that I did. * * * I have suffered much from neuralgia of the head. I do not know that I have suffered with congestion of the vesicles of the brain. I have suffered with dyspepsia of the stomach. * * * I judged he was healthy, because he was rarely absent from church-meeting, prayer-meeting and lectures (237).

Maria S. Kenyon:

I never knew him to have employed a physician for any sickness of his own. He was subject to occasional headaches; we all are. I have no recollection of his headache keeping him from the table. He was in the habit of going out every day.

I do not think he would hardly have submitted to us going with him as attendants because of weakness. He went forth alone every day (239). * * * We bestowed upon him such care as sisters who love their brother would naturally bestow. We tried to make his room as pleasant as possible for him, and if he had a headache his head might be bathed; anything of that kind. * * * He was well, as far as we observed, all the time; but he was not as strong the latter part of the last year as before (240). * * * He had occasional headaches. The only sickness he had physically was occasional headaches, the same as we all have. I mean that I am subject to headaches, and my sister is sometimes subject to them. I guess we are all sometimes subject to them (251).

Dr. A. N. Brockway, of New York:

I was consulting physician at the time of Mr. Kenyon's death. I used to see him now and then during the years previous to his death. I cannot say I saw him frequently. I supposed him to be a man enjoying good health. When I met him, I merely said "How do you do?" or something like that; I never entered into any extended conversation with him (267). I saw nothing that indicated weakness of body or mind. I was never called by Mr. Kenyon to attend him in sickness (268).

Margaret E. Kenyon, cousin of John S. Kenyon:

He appeared to be in good health (269).

Elizabeth B. Kenyon:

He had an excellent appetite. I don't know that I ever knew him to lose a meal while he was at the house. He had sometimes a headache, and sometimes complained of neuralgia in his head; but it never kept him at home (270). He always waited upon himself (271).

Caroline P. Brown:

His health was very good indeed, with the exception of headaches occasionally (276).

Samuel H. Virgin:

Met him at church and at the residence of Mr. Kenyon's sisters, and on the street.

He seemed to be as well as any man of his years. I did not notice anything but that he was a man of perfect health (280).

Henry P. McGown:

Paid him interest money at Mr. McGown's office. He never came attended. His apparent condition of health was pretty good, as far as I could see. * * * I never met him accompanied on the street (288). * * * Our social relations were intimate. I discovered no difference in his health, except that he grew older. We were both growing older. That was the difference (289). * * * I do not think I ever saw him at his house except on one occasion; that was on his death-bed (290).

C. W. Van Voorhis, of New York:

I am one of the Board of Trustees of the bank (291). * * * During the time he [Mr. Ken-

yon] was secretary of the bank, his apparent condition of health was perfectly good. I have frequently met him on the street unaccompanied. * * * I did not know a man that I considered in better health than John S. Kenyon. I have walked with him from my office, 82 Nassau, to the Bowery Bank (292). * * * I do not know among my acquaintances a more prudent, careful, sagacious man in relation to business than he was (294).

Fred Heubner:

He told me his health was very poor, and he could not go out much. That was in 1880 (324).

George Vilas:

I think his health was not very good. He used to talk with me quite frequently about it, and he complained especially at the time he was building the house that his head troubled him. It seemed to worry him. His health was not good (326).

Charles VanAlstine:

I saw him very frequently in 1879, 1880 and 1881, perhaps two or three times a week, walking to church, rowing or sailing on the lake, and more frequently at Mrs. Sutton's residence, and walking about town. I saw him at the Breck place, doing nothing more than look around. Sometimes he went there in a boat (314, 315). * * * I have seen him alone, and I have seen him more frequently with Mrs. Sutton. * * * He would ride and fish and sail, but not to the excess that

some people do (315). * * * I know that he had spells when he was not well; I know that he complained of his head a good deal; I know that he kept out of the sun as much as he could; that is about all I do know (316). * * * He was confined to his bed in 1878 or 1879 (317).

H. Lorleberg:

He complained about his head several times at the time he began the building in 1880. He told me several times he felt badly. A particular time at his house he came to the door; he had told me to get the plans of the building to make figures—estimates. He seemed to be very much troubled that day. He seemed to be mad that I had come for the plans. He seemed very nervous (330). * * * I should judge that he was rather in failing health. He was not what I regard a hearty, healthy man (330).

Amund Simons:

He did not seem to me a healthy, robust man. He seemed to be kind of sickly, and he seemed to be growing old (333).

R. C. Hathaway:

Often saw Mr. Kenyon alone on the streets of Oconomowoc—almost always alone. I run the line between the Breck place and Judge Small's. Mr. Kenyon was there. I saw nothing out of place with him. I often talked with him. I think I was all right then. Something was the matter with me at one time—I think in the fall and summer of

1881. I don't know what was the matter (349–351).

Richard Lardner:

Knew Mr. Kenyon when he was in Oconomowoc; conversed with him in my store; saw him out alone and with other people. His mental condition was good; appeared well for a man of his age. I was not intimate with him; knew he was sick once; might have been sick many times, and I not know it (351–354).

Warham Parks:

Knew Mr. Kenyon; was accustomed to see him on the streets almost every day. He asked me about Hathaway's ability as a surveyor. He was all right, sagacious and clear-headed. I was attorney for the Brecks, and drew the deed to Mr. Kenyon. He was alone in this business. I never was at his house; could take no pleasure in visiting him; don't know when he was sick; did not know his business; have been sick myself, so could not see him for a week or so, and he might have had the same thing, and I not know anything about it. I would meet him almost every day when I was down town, as I met hundreds of others. If he was sick his absence was not noted by me. I was not intimately acquainted with him to inquire or note his absence. He seemed to me to be a very parsimonious man, and sort of narrow-minded and bigoted. I never liked him much. I never sought his society. He found a great deal of fault with the postoffice arrangements, because

the New York *Herald* did not arrive at breakfast every morning. * * * He was one of those men whose mind not being very much occupied with great things, it was impressed with very small things (359–361).

The witnesses for the plaintiff

do not differ from five of those of the defendants, and they do not, like defendants' witnesses, differ among themselves, in stating the condition of Mr. Kenyon's health. The reason is, they know whereof they speak. We here produce their testimony.

Mr. Westover:

Speaking of the time when Mr. Kenyon commenced living in his family in 1872, *testified:*

He was not well. He never was well since he first came to Oconomowoc. He was a pretty old man then; that is he appeared to be a pretty old man; I didn't know his age; he was at least old enough to be Mrs. Sutton's father; older I should say than her own father was. * * * He needed a great deal of nursing and attention. He suffered frequently with violent attacks of headache. There were premonitions in him of brain decay, and at times he felt and apprehended that he was in danger; at other times he was hopeful and cheerful. He needed more attention and care when near Mrs. Sutton in the little details of life than any man I ever saw. He seemed to dread to be alone (24).

Louise C. Williams:

Mr. Kenyon was a part of the household and considered by us, supposed to be by us, a man in rather delicate health—was known I should say; and particularly in charge of Mrs. Sutton. She was caring for him (65). * * * I know he was a man subject to sick turns, and while a boarder at my brother's his room in the house was exactly opposite to hers [Mrs. Sutton's]. The doors were left open for communication, that she might hear anything if he was sick in the night, or in trouble (103). * * * He [Mr. Kenyon] says, "I am obliged to go to New York, and I do not think it prudent for me to go alone, and feel as if they [Mr. and Mrs. Sutton] must go with me." This was in the spring of 1881. * * * He [Mr. Kenyon] was subject to sick attacks; I cannot say how often they occurred, but I understood always he was quite liable to them at any moment, or most any day. In speaking of himself he used to say, "My head" (104, 105). * * * I know he was confined to the house after 1874 to the time of his death, a great many times. He always complained of his "poor, weak head." I don't think he knew what was the matter (106). * * * He went about, not as other men do, but as an invalid for his health. He was not able to take the wear and tear of life very much (107).

Dr. D. McL. Miller:

He was an invalid. He was always sick. He was one of those men who suffer from dyspepsia,

and greatly from neuralgia in the head. In the spring or fall of 1879, I think in the fall, he had an attack of apoplexy; I think it was in September. It increased very much his head trouble, so he complained of pain and dizziness in the head constantly after that. The two years he was there after that his complaint was constantly in the head. * * * He used to come to my house very frequently. During this attack of apoplexy I of course attended him constantly. He was confined to his room, I think, two weeks (109). * * * He sent from New York to me [at Oconomowoc] four or five times for prescriptions; the last time he sent was in the winter of 1880. He was then suffering a great deal with dizziness and had been relieved by a prescription I gave him, and he wanted it renewed (110). * * * He had the dyspepsia when he first came here, [Oconomowoc] and neuralgia quite frequently. Up to the time of this attack of apoplexy in 1879, he usually amused himself by rowing and sailing on the lakes (112). * * * He was not confined to his bed from dysyepsia, but it was necessary he should be particularly careful, because these attacks of neuralgia were produced by the condition of the stomach. The dyspepsia made him morose. I have known him to have neuralgia here in the summer twice a week; not regularly. He would have an attack of neuralgia, and perhaps not get over it for four or five days, in one week. The next week he might be free from it, and then it would go on, and he would have a slight attack,

and then it would be repeated very quickly. I don't think I ever knew ten days between the attacks. He was under my treatment constantly. My books do not entirely and completely show my attendance upon Mr. Kenyon. Frequently he would come to my house, and pay me for my consultation; frequently I would meet him in the street; frequently I would be over to my sisters, in an evening. The years my mother spent here I made it a point to be there every day, and at those times was consulted frequently by Mr. Kenyon (113). * * * Up to 1879 he went about alone. After his attack of apoplexy, I do not know of his going out alone but once; it was in a yacht race; he sailed a boat, and he told me he had gone to sleep as the reason he came in far behind (114). * * * In the attack of apoplexy there was no general paralysis. It was a congestive attack. He was unconscious, or semi-unconscious. You could rouse him; he would answer in monosyllables; he could not think; he could not answer a long question; he had no ideas. That condition I think, lasted two days. After the two days he gradually recovered, and recovered the power of his muscles to a certain extent; he never recovered it fully. * * * He may have gone to New York after that unattended; I do not know; it was contrary to my desire and directions; it was a very dangerous and risky thing for him to do (114).

Dr. Samuel A. Hill :

I have heard him speak of his head troubling him, many times—I might say for years. * * * He showed signs of weakness—infirmities, I might say, of body, not particularly of mind, that I know of. He required more than ordinary attention and care (131).

Dr. N. M. Freeman, in whose family Mr. Kenyon ate his last dinner on earth (149), *said:*

I think that the attack of apoplexy and the subsequent headaches were produced by the same cause. I do not suppose the apoplexy caused the headaches or the headaches the apoplexy, but the same thing that caused the apoplexy caused the headaches, which was the congested state of the brain (153). * * * If Mr. Kenyon had headaches previous to his first attack, and headaches afterward, I think it more needful that he should have an attendant after the attack than before. If the headaches had culminated in an attack of apoplexy, that shows that he was subject to it, and was liable to have another attack. It is possible for one to have an attack of apoplexy, and, recovering, go forth to all appearances strong and able, and to continue active many years. The rule, I should say, on the whole is, that a man who has one attack is more liable to another; we look for another, and, unless precautions are taken against it, it will almost invariably come (154).

Adelia M. Valentine:

Mr. Kenyon was sick once while I was there, I believe; and he was not feeling well most of the time. He complained of his head. I think he was confined to the house, but I don't remember whether he was confined to his room (163). * * * He didn't seem well; he seemed like a sick man; he complained a great deal (164).

Julia L. White:

When I was in Oconomowoc Mr. Kenyon complained a great deal of pain in his head; three-fourths of the time, I should think. Sometimes he would go to bed with it; other times he sat in a sort of invalid chair, with his head bound up (167). * * * When his head was pretty bad he didn't like the light (169). * * * I thought he was pretty feeble, and had a great deal of trouble with his head. He complained of those attacks (171)

Joseph Scott:

He [Mr. Kenyon] told me he had two strokes of apoplexy, and the third would probably end it (363). * * * He spoke of a buzzing in his head—his head ached. He very frequently complained of that Sundays in church. He could not remain in Sunday-school part of the time (365). * * * Sunday-school was immediately after church. He staid a half of the time. He was elected assistant superintendent, but he could not fill it very well, on account of his head; he could not talk so he could be heard over the room (370).

VI.

A few Suggestions on the Evidence.

—Some of the testimony on the part of defendants had no purpose unless to show that the plaintiff did not render services to Mr. Kenyon such as she claims, and that he did not need her services. The principal witnesses upon this subject were Maria S. Kenyon and Elizabeth B. Kenyon, both of whom testified to the uniform good health of Mr. Kenyon. The first flatly impeaches herself, and illustrates the demoralizing power of being disappointed in one's hopes of being an heiress, by the letter she wrote Mrs. Sutton, when Mr. Kenyon was suffering in Oconomowoc with prostration from a recent stroke of apoplexy (371 and 372). The second shows her malice when she says of Mrs. Sutton: "She seemed to prefer to be at Mr. Ken-"yon's, but at that time she felt that she must go—"very much against her will, I presume" (271).

—Mr. Kenyon did not prefer to make his home with Maria and Elizabeth Kenyon. He had his own reasons. No one can question his right to freely act upon his own choice and judgment. In later years, when in Oconomowoc, he was rarely out of the house, except in Mrs. Sutton's company. When in New York, before he began housekeeping there, in the winter seasons, with Mr. and Mrs. Sutton, he made his headquarters with Maria and Elizabeth, but when he went out he went alone, and did not invite either Maria or Elizabeth to accompany him

(250–252). They interceded with him to make his home with them, and they labored with him that they might persuade him to live in his house in New York, and permit them to live there with him and be his housekeepers (371). Mr. Kenyon did not accede to their request. He had reasons for being happier with Mr. and Mrs. Sutton (255). Maria asked even to be allowed to go to him at Oconomowoc (371), but he had made his home with Mrs. Sutton for life. Therefore, when he began to reside during the winters in his house in New York, Mr. and Mrs. Sutton were with him, and Mrs. Sutton was housekeeper and nurse.

—The defendants have questioned the full truthfulness of the testimony of some of plaintiff's witnesses. They say that Mr. Westover examined witnesses on behalf of plaintiff, when depositions were taken in New York. So, also, did the chief executor, Erastus Brown, chief defendant, a lawyer, examine and cross-examine witnesses at the same time, and was also a witness in the case. His son, another lawyer for defendants, and the attorney of record in the court below, was also examined as a witness. We do not think the testimony of these scrupulous gentlemen is any the less worthy of credit. The testimony of Mr. Westover and that of every witness for the defense was in every point fully and repeatedly corroborated by many other witnesses.

—The defendants seem to have attempted to show that Mrs. Sutton did not give Mr. Kenyon the care

and attention, during all those years, as she claims and some of the witnesses have shown. The testimony is overwhelmingly in favor of Mrs. Sutton on that point; but we beg to call the attention of the Court to an occurrence that appears in the report of the deposition of Mrs. Westover, a sister of plaintiff. Mr. Kenyon and plaintiff together resided in the family of Mrs. Westover for two years, from 1872 to 1874. She was very intimate there, and afterward at plaintiff's house, with Mr. Kenyon—Uncle John, as she called him. Who so well as Mrs. Westover had opportunity to know all the details of the life of Mr. Kenyon and Mrs. Sutton? Who so well could tell the services which Mrs. Sutton rendered her aged friend? Mr. Westover had given his evidence, and had described to some extent the relations between the plaintiff and Mr. Kenyon. Mrs. Westover was then sworn, and asked:

Q. State what you know about the relations between Mr. Kenyon and Mrs. Sutton?

Mr. JENKINS (for defendants). It is not necessary to go into that; there will be no dispute about all that.

Mr. HURLBUT (for plaintiff). Very well, then, let it be noted that the relations between Mr. Kenyon and the complainant, and the services performed for him by complainant, are admitted to be as testified to by Mr. Westover.

Mr. JENKINS. About their living together, and all that, we don't dispute. Go on with your questions about this place, if you have any. (Printed transcript of record, p. 43).

Therefore no questions were asked Mrs. Westoover on the subject of Mrs. Sutton's services to Mr. Kenyon, or the relations between them. Certainly the defendants cannot now retract that admission.

VII.

The Opinion Delivered Orally at the Circuit by Justice Harlan.

This is a suit for the specific performance of an alleged agreement for the conveyance of real estate. The agreement is alleged to have been made between Mrs. Sutton and Mr. Kenyon, now deceased. Mr. Kenyon's wife died, I believe, in about 1870 or 1871, and his wife was upon intimate terms with Mrs. Sutton, who attended her in her last sickness under circumstances that attached Mr. Kenyon to her very much, which, of course, was strengthened by the consideration that their families were previously friendly. They came to Oconomowoc, Mr. Kenyon making the house of Mrs. Sutton his home. I am satisfied from the evidence that, when he first came west, he was somewhat uncertain in his own mind as to his health. I am also satisfied from the evidence that there were no such relations between him and his own relatives in New York as made it entirely agreeable to him to remain there and make it his home, and that he felt more at home in the house of Mrs. Sutton than anywhere else. From that time down to 1880 he lived as a member of her family, remaining with her as a member of her family, she giving him all the attention that a wife would give to her husband, or a daughter to her father, he paying some board, or contributing something toward the support of the family, and performing other acts of kindness. He was a man of what may be called

large estate, one hundred and fifty thousand dollars or more, and he intended after he went there to make some provision for her that would make her comfortable, as a return in part for her care for him. In part prosecution of that plan he gave her a house in Oconomowoc that he subsequently estimated was worth $4,000.00. He made, executed and acknowledged a deed for it in 1874. The evidence fails to show who had possession of that deed from that time until it was recorded in 1882, shortly after the death of Mr. Kenyon, but undoubtedly, from the evidence in this case, that property was given to her and intended to be hers; but in 1880, after he had some serious premonitions of disease, he formed the plan, and I am satisfied from the testimony, announced it to her of buying the place called Breck place, and putting a house upon it large enough to enable her to take summer boarders, and, when he was dead, to enable her in that way to maintain herself and her husband; and that plan was partly executed. The land was bought, and the house was partly erected, when he went to New York the last time, Mrs. Sutton going with him I believe at that time as she had on former visits. He died in January, 1882. We have not relied in this case upon the abstracts of the testimony, as well taken as they are, but have read all the testimony, every part of it, and I am satisfied, as my brother Dyer is, that this agreement as alleged is substantially proven. If it be not, the case is fuller of perjury than any I have ever had anything to do with. If this purpose

was not performed, and this agreement was not made, that he was to buy this property and put it in this condition, and that she was to have it in consideration of that being made his home and he being cared for by her during his life, if that was not his purpose, and if that was not communicated and announced by him, there are any number of witnesses in this case that have been guilty of unmistakable perjury. There is no middle ground. I have read carefully the testimony of Mr. Westover and his wife and Judge Small and his wife, and the testimony of a large number of other people at Oconomowoc, which is fortified by the testimony of Dr. Hill and his wife and Mr. Freeman and his wife, of New York, in some particulars; and we do not doubt their testimony, and do not doubt that this was his purpose, and that he had good ground for it in the care which had been had of him in his condition by Mrs. Sutton, and that what he agreed to do in consideration of what she agreed to do, was not unreasonable compensation, in view of the amount of his estate, and of the purpose which he had formed, as disclosed by his will made in 1879, to give the great bulk of his estate to charitable institutions. It was perfectly natural under their relations, and under the circumstances, that he should select Mrs. Sutton out from all others as the one upon whom he designed to bestow this charity as a protection for her during her life. Some effort was made to show that Mrs. Sutton's care for him during all this long period of ten or twelve years was not as close as

she claimed, and her friends claimed, and that he was not in a condition to claim such attention. But, if we had time, I could read what to my mind is very strong evidence upon that point, that is, the letters of Mr. Kenyon's family from New York, written to Mrs. Sutton. They furnish very persuasive evidence that he was an afflicted man. While he was able to go about, and fish, and enjoy himself with others, it is clear that he had premonitions himself of some defect and ailing in his head which indicated that he needed the constant care and watchfulness of some one who was willing to do it as Mrs. Sutton was. These letters afford evidence of the strongest character that her services in that regard were recognized, understood, and believed in by his own family. So that there is, in our judgment, a case of an agreement by him, in consideration that she would care for him during his life, to buy this place, put a house upon it, and make a conveyance of it to her; and that was his deliberate purpose. And he was only cut off from that final act of making the conveyance and the entire completion of the house, by his sudden and unexpected death. The question was discussed in the case as to whether there was possession delivered to Mrs. Sutton. I have used pretty nearly the language of the Supreme Court of this State, that the possession was "as far as the nature of the case would permit." Mr. Sutton, the husband, made the first drafts of the plans; they were supervised of course by an architect. He superintended very largely the construc-

tion of the building. The fact that he was in possession was drawn out in a conversation between him and Judge Small, as well as Mr. Westover, but particularly Judge Small, when he learned from Mr. Kenyon that he had bought this place for Mrs. Sutton; was building the house for her; it was to be hers; to be finally made to her. Being a lawyer, he naturally inquired as to whether the title had been made to her, and was answered by Mr. Kenyon, "No, I have not made the title. My papers are in New York, my lawyers are there (doubtless having in mind his will made in 1879), and when I get there where my papers and my lawyers are, I will make this alteration, or I will do what is necessary." And he said to Mr. Small, in the language of Mr. Small's testimony, "I have put them in possession; they are in possession just as much as they would be if they had a deed, and there will be no quibble on that question." That Mr. Kenyon was also in possession in a certain sense, that he was with them on and about the place, looking around, and had some concern about it, is very natural from the fact that they all lived in the same house. They held such relations that they all were interested. I attach no consequence to the fact that the bills done for work on the house were, after his death, sent to his estate and paid by his estate, even with the knowledge of Mr. Sutton, because that was the original plan, to pay for it himself, and the only question is, whether the relief may be given. The defendants relied largely upon the case in IV Wallace. I have

examined that case very carefully, and I think substantially this case can be made to satisfy the principles of that opinion. There are cases in Missouri, New Jersey and Illinois which I think fairly justify the relief to some extent that is asked. It is a case therefore, of an owner of real estate buying it for a particular person upon a sufficient consideration, upon an agreement that if that person would care for him during his life that she should have it; that it was to be her property, and that is what she was to do in return for it.

These are services that are not to be estimated as you would estimate the services of an ordinary nurse. There are a thousand and one attentions that are necessary in the case of a sick man that could not well be rendered by a nurse, could only be rendered by one who sustained closer relations. Mrs. Sutton had performed these duties, and held these relations substantially since 1870 or 1871. I think that, in consideration of that class of services, and what she had agreed to do, followed as it was by such possession as the circumstances of the case would permit, that it makes a case of such part performance as, in the principles of equity, would entitle the plaintiff to a decree for performance in part. I say, in part, because the bill in this case asks that these executors and trustees who hold the title to this property, be required to go on and build this house in accordance with this agreement. We do not think that the Court can undertake to supervise the work of constructing a house. There is a further reason why the relief

asked cannot be granted, and that is, that while Mr. Kenyon made this agreement with her, and made this promise to her, his discretion was not absolutely lost as to the kind of house he would put upon it, how much of an improvement he would put upon it. He was at liberty to exercise his discretion upon those subjects. As he is dead, that discretion of course could only be exercised by the Court, if the Court should attempt it. We think the Court should not attempt to exercise it, and all that we can do is to give a decree for the conveyance of the real estate, as it is, without any decree for any further performance of the contract.

THE LAW OF THE CASE.

VIII.

A married woman may, in the State of Wisconsin, contract for and purchase real estate in her own name, on credit or otherwise.

Revised Statutes of Wisconsin, chap. 108, secs. 2340–2347.
Dayton v. *Walsh*, 47 Wis., 113.
Cramer v. *Hanford*, 53 Wis., 85.

The intention of a party may be gathered from his acts and declarations. The intention of a promissor to convey the premises is related to his promise to make the conveyance; and both may be shown by his declarations.

West v. *Bund*, 78 Mo., 407.
Chadwick v. *Farmer*, 69 N. Y., 404.
Littlefield v. *Littlefield*, 51 Wis., 23.

X.

The General Rule.

The part performance of a parol contract for the conveyance of lands may take the contract in a court of equity out of the statute of frauds, and render it capable of being enforced by way of specific performance.

Fry on Specific Performance, sec. 383.
1 Story's Eq. Jurisprudence, sec. 759.

Acts of part performance are evidence of the existence of some agreement in pursuance of which they are done, and they must be consistent with the agreement alleged. Making known what that agreement is, must be the result of evidence which the acts in question are allowed to introduce.

Fry on Specific Performance, secs. 385, 386.

XI.

In the case at bar, the acts of part performance were:

First. The possession of the premises placed in the promisee.

Second. Valuable labor and services expended in improving and building upon the premises; and,

Third. The entire performance on the part of the promisee of all the acts required of her as the consideration for the promised conveyance.

The promisee having performed all, and the promisor having performed a part, of the contract, it is thereby taken out of the statute of frauds.

Bigelow v. *Armes*, 108 U. S., 10.

XII.

The Rule in Wisconsin.

The complainant, having performed the obligations constituting the consideration, having been put in possession of the premises, in pursuance of the agreement to convey, and having expended subsequent labor in material improvement thereof, is sufficient to take the case out of the statute of frauds.

The Revised Statutes of Wisconsin enact the statute of frauds, but add to it this section:

> Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements, in case of part performance of such agreements. (R. S. Wis., sec. 2305.)

The courts of Wisconsin thoroughly support the rule that part performance, consisting of payment of part of the consideration, taking possession, and making improvements on the premises, takes the case out of the statute.

Blanchard v. *McDougal*, 6 Wis., 170.
School District v. *Macloon*, 4 Wis., 79.
Fisher v. *Moolick*, 13 Wis., 358.
Ingles v. *Patterson*, 36 Wis., 373.
Seaman v. *Aschermaun*, 51 Wis., 678.

And even if possession by the promisee be not referable to the agreement, specific performance will be decreed where he cannot be restored to his former position, and would be greatly injured if the agreement were not enforced.

Daniels v. *Lewis*, 16 Wis., 141.
Paine v. *Wilcox*, id., 202.
Littlefield v. *Littlefield*, 51 Wis., 23.

In the case last cited, mother and son were tenants in common of a piece of land, and resided together on other property belonging to the son. They agreed verbally that the son would pay his brother a certain sum, and would take care of his mother during her life, in consideration for the mother's interest in the land. The son managed the land, and held possession after the mother's death, having performed his part of the agreement. *Held*, a proper case for specific performance.

So, where a mother agrees, in consideration of her son returning to her farm, working it, and maintaining her from it, to give it to him, the contract may be enforced after her death against her heirs.

Thrall v. *Thrall*, 60 Wis., 503.

XIII

The general rule, as adopted by the courts of England and of this country, does not differ from that quoted above from the text-writers, or as expounded by the courts of Wisconsin; part per-

formance of a parol contract for the conveyance of land being sufficient in England, and in nearly all the States of the Union, to take the agreement out of the statute of frauds.

Lester v. *Foxcroft*, 1 Coles' P. C., 108.
1 Leading Cases in Equity (Hare and Wallace's notes), 719, 625.
Parkhurst v. *Van Cortland*, 14 John, 15.
Annan v. *Merritt*, 13 Conn., 479.
Newton v. *Swazey*, 8 N. H., 9.
Farrar v. *Patton*, 20 Mo., 21.
Grant v. *Ramsey*, 7 Ohio, N. S., 157.
Cannon v. *Collins*, 3 Del. ch., 132.
Winchell v. *Winchell*, 100 N. Y., 159.
Green v. *Jones*, 76 Me., 563.
Shuman v. *Willits*, 17 Neb., 478.
Burns v. *Fox* (Ind.), 14 N. E. Rep., 541.
Woodbury v. *Gardner*, 77 Me., 68.
Anderson v. *Shockley*, 82 Mo., 250.
Bolman v. *Wolford*, 80 Va., 213.

XIV.

The Plaintiff's Possession was not defeated by Mr. Kenyon's presence on the premises.

As a rule, the possession of the promisee must be exclusive, but where the circumstances of the case are such that the promisor occupies the premises with the promisee, it will not prevent the specific performance of the agreement, if the occupancy be

not adverse to that of the promisee, and the possession of the promisee be consistent with his claim of title.

So, where a father agreed to convey his home farm to his daughter, in consideration of her services, and they both lived together on the farm, and the father gave her charge of the construction of a new house thereon, and she assisted largely in the management of the farm, and remained in possession thereof after his death, it was *held*, that her possession was such as to take the contract out of the statute of frauds.

Warren v. *Warren*, 105 Ill., 568.

And where a father verbally agreed to sell his son a tract of land for past services, after the son's majority, and it was agreed that the son should pay the father rent during the father's life, and the father should pay the taxes, the payment of rent by the son will not make him a tenant of the father, so as to defeat an action by the son for a specific performance after the father's death. *McDowell* v. *Lucas*, 97 Ill., 489.

And a temporary cessation of actual possession, without an intention to surrender the contract, will not defeat the right to a specific performance. *Drum* v. *Stevens*, 91 Ind., 181.

If the promisee be already in possession, having a life estate in the land, when the parol agreement be made to convey him the fee, the consideration being paid, and the parties having died, the agree-

ment will be enforced between the heirs of the parties. *McClure* v. *Otrich*, 118 Ill., 320.

And where the promisee, under a verbal agreement, was in possession, as a tenant, when the promise was made, and, relying on the promise, the promisee made improvements upon the premises, and the promisor died before executing a deed, the promisee was entitled to a specific performance by the heirs of the promisor. *Hilbert* v. *Aylott*, 52 Texas, 530.

XV.

An uncertainty as to the time when the deed shall be executed and delivered, will not defeat the promise.

So, where a son agreed to reside with his father, in his father's house, take care of the father, and turn over to him, each year, a portion of the crops, in consideration of which the father verbally promised to convey the son a certain parcel of the land, no time being specified when the deed should be given, it was *held* sufficient to sustain a bill for a specific performance against the administrators and heirs of the father. *Lamb* v. *Hinman*, 46 Mich., 112.

XVI.

The Consideration.

The consideration for the promise by the deceased to buy and convey to appellee the premises in

dispute, was the care which she had bestowed on him for more than eight years previous to the making of the promise, and the care thereafter to be by her bestowed upon him for nearly two years, until his death.

As almost the entire life of the appellee, during ten years, was devoted to the wants of the deceased, in the way which he desired and preferred, and seemed happy and contented in receiving, the amount of the consideration rendered seems at least great enough for the reward she was to receive, considering the wealth of the promisor, and the fact that he was wifeless and childless, and intended to will the bulk of his property to various charities.

Even in ordinary contracts, a promise or obligation cannot be defeated on the ground of the inadequacy of the compensation. The slightest consideration is sufficient to support the most onerous obligation, and the consideration cannot be impeached, except by showing non-performance, fraud, mistake, or illegality. *Oakley* v. *Boorman & Johnston*, 21 Wend., 588.

Therefore, if the consideration be less than the value of the land, it does not alter the rule granting specific performance. *Losee* v. *Morey*, 57 Barb., 561; *Ottumwa C. F. & St. P. R. Co.* v. *McWilliams*, 32 N. W. Rep., 315—70 Iowa, 164.

So, where a father made a verbal agreement with his son, that, if the latter would remain in this state, and live upon a tract of land of the

former, and improve it, it should be the son's after the father's death, the son to pay a certain share of the crops during his father's life, the son having performed his agreement, it was *held* a specific performance was properly decreed after the father's death (*Smith* v. *Young*, 110 Ill., 142). The payment of a portion of the crops affects neither the question of consideration nor of possession. The decree for specific performance would be granted in such case if there had been but possession taken and improvements made. *Langston* v. *Bates*, 84 Ill., 524; *Kurtz* v. *Hibner*, 55 Ill., 514; *Bright* v. *Bright*, 41 Ill., 97.

C. lived in Iowa. He had no family, but had many relatives in other states. For years he was intimate with S. and family, and staid with them in leisure and sickness. Two years before his death he bought a small farm, near where S. resided, and built a cabin on it. S.'s wife baked for C., and sometimes washed for him. Being taken sick, C. was removed to the house of S. He then verbally promised S., that if S. would take care of him while he lived, S. should have all his property. A week afterwards, he died. *Held*, in an action for specific performance, that S. was entitled to the farm. *Rink* v. *Sample*, 56 Iowa, 100.

If part of the consideration for a verbal promise to convey land be the care and support of the promiser for life, if there be part performance, and the promisee be ready and willing to continue giving the care and support to promiser, the agreement will be enforced. *Neel* v. *Neel*, 80 Va., 584.

And, in general, an agreement to support or render services, as consideration for a verbal promise to convey lands, if carried out, is such a definite performance of the contract as entitles the promisee to a conveyance of the premises. *Hiatt* v. *Williams*, 12 Mo., 214; *Rhodes* v. *Rhodes*, 3 Sandf. Ch., R., 279; *Davison* v. *Davison*, 2 Beasley, 246; and cases cited herein, *ante* and *post*.

Where the promisee took possession under a parol agreement, paid no part of the purchase money, and his labor or improvement upon the premises consisted but in plowing twenty acres of land; *held*, sufficient to take the case out of the statute (*Haines* v. *Spanogle*, 17 Neb., 637); and a tenant who took possession, paid some rent, and cut his carpets, under a verbal promise of a lease, was held to be entitled to a specific performance of the promise. *Wendell* v. *Stone*, 39 Hun., 382.

XVII.

Even a parol gift of land is protected in equity equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property.

Neale v. *Neales*, 9 Wallace, 1.
Dawson v. *McFaddin*, 22 Neb., 131.
Anson v. *Townsend* (Cal.), 15 Pac. R. 149.
Irwin v. *Dyke*, 114 Ill., 302.
Freeman v. *Freeman*, 51 Barb., 306; 43 N. Y. (Hand). 34.
Halsey v. *Peters*, 79 Va., 60.

XVIII.

SPECIAL CASES.

As to consideration and promises:

An elder daughter, after the death of her mother, continues to reside with her father at his request, and to keep house for him until his death, a period of thirty-eight years, managing the household and assisting in managing the farm. The father had verbally promised to her his farm, in consideration of her services, and had declared to others that the farm was hers. *Held*, after her father's death, she was entitled to a specific performance of her father's agreement. *Warren* v. *Warren*, 105 Ill., 568.

A verbal agreement by the owner of land that, if a church-building should be erected thereon, he would convey to the society erecting it, when organized, the fee of the land, purports a good consideration for the promise to convey. The owner of the land, who was an elder in the church, and his son, who was janitor, held the keys to the church, made repairs on the building, fenced off the church lot from his other land, and paid taxes thereon at his own expense. *Held*, the church was in possession, and was entitled to a specific performance of the agreement to convey. *Whitsitt* v. *Trustees*, etc., 110 Ill., 125.

A father verbally offered to purchase for his married son a certain tract of land in the neighborhood if the son would live upon it, and would

decline to accept from his father-in-law an offer of $1,000 to move into another state. The son accepted the offer, went upon the land designated, raised a crop on it, repaired the house and fences thereon, made gates, put a pump in the well, and made other improvements, but died before his family occupied the premises. *Held*, the heirs of the deceased were entitled to a conveyance from the promisor, he having purchased the land and taken title in his own name. *Bohanon* v. *Bohanon*, 96 Ill., 591.

And where a man agreed verbally that, if his son-in-law would reject an offer of employment, and would make his home upon a tract of land near him, he would give the daughter the land, and would help her improve it, and, induced by the promise, the son-in-law declined the offered employment, and went with his wife to live upon the land designated, and remained there, a specific performance was decreed against the father. *Welch* v. *Whelpley* (Mich.), 28 N. W. R., 744.

And so, where the only consideration for the verbal promise to convey was that the promisee should go upon the land and improve it, and she did so, her assignee maintained an action for a specific performance of the promise to convey. *Hayt* v. *Hunt* (Col.), 15 Pac. R., 410.

Where a man took his infant nephew to live with him as his son, promising to give the nephew all his property at his death, and the nephew lived with him by virtue of the promise, and served him

many years, the uncle could not dispose of his property during life so as to defeat the promise to the nephew. *Van Duyne* v. *Vreeland*, 1 Beasley, 142.

An agreement by aged persons to will their property to one who would, in consideration of that promise, take care of them till death, was upheld in *Gupton* v. *Gupton*, 47 Mo., 37, and in *Sutton* v. *Hayden*, 62 Mo., 101.

A., an aged bachelor, orally promised B. and wife to convey his house to M. if B. and wife would occupy the house, permit A. and nurse to live there, and would board them while he lived. B. and wife accepted. A. died in nine months. The house was worth $3,000. *Held*, specific performance should be decreed. *Watson* v. *Mahan*, 20 Ind., 223.

We respectfully ask the Court to affirm the decree.

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